IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-1208

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LOUISE ORR ESTABROOK,
Petitioner,

versus

WATSON W. WISE and
PHILLIPS PETROLEUM COMPANY,
a Corporation,
Respondents.

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Petition for Writ of Certiorari
to the Supreme Court of Florida
and
the District Court of Appeal,
First District of Florida

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Wilmer H. Mitchell and
Lawrence W. Oberhausen of
MITCHELL & OBERHAUSEN, P.A.
130 East Government Street
Pensacola, Florida 32501
Attorneys for Petitioner

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## OPINIONS AND DECISIONS BELOW

The Final Summary Judgment from the trial court, the Circuit Court of Santa Rosa County, Florida, was not reported, but it is set forth in the Appendix, infra, pp. 44A to 45A. The decision on the Appeal from that judgment is reported under the style Estabrook v. Wise, et al, 348 So.2d 355 (1 DCA Fla. 1977) and set

out in the Appendix at 49A to 53A. The Order of the Supreme Court of Florida denying Petitioner's Petition for Certiorari is not yet reported. The decision is styled Estabrook v. Wise (Case No. 52, 380, decided November 30, 1977) and is set out in the Appendix at 64A.

## JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are as follows:

The District Court of Appeal, First District of Florida filed and entered its decision July 11, 1977 adverse to the Petitioner's Appeal of the Summary Final Judgment by the trial court and denied the Petition for Rehearing by its Order filed and entered August 8, 1977 (59A). This decision denied Petitioner's appeal of right to the highest court of the State of Florida having jurisdiction of such appeal.

Petitioner sought a Writ of Certiorari from the Supreme Court of Florida to the First District Court of Appeal which is a discretionary writ permitted under Article 5, Section 3(b)(3) of the Constitution of Florida, and Florida Appellate Rule 4.5C.(6), limited to a consideration of whether the decision of the District Court of Appeal conflicted with prior decisions of the Supreme Court of Florida or District Courts of Appeal of Florida. The Supreme Court of Florida denied the Petition for Certiorari by its Order



entered and filed on November 30, 1977. (64A) There is no provision under the Florida Rules for a Petition for Rehearing on such an Order. Thus Petitioner has exhausted all avenues of appellate review permitted in Florida.

The statutory provision of the United States conferring jurisdiction on this Court to entertain this Petition for Writ of Certiorari is 28 USC, Section 1257 (3) which provides this Court with authority under certain circumstances to review a final judgment or decree of the highest court of a state in which a decision could be had where the judgment turns upon a substantial federal question.

## QUESTION PRESENTED

Stated generally the question presented is whether the courts of Florida failed to give full faith and credit to the laws of Texas and a judgment of a Texas court.

More specifically the question presented is whether, in spite of the full faith and credit provisions of the United States Constitution, the courts of Florida can refuse to permit a Texas resident to enforce rights in Florida realty obtained under the marriage laws of Texas, preserved by an agreement in a Texas divorce, and recognized in a Texas divorce judgment, on the ground that the Texas divorce proceeding is res judicata and a bar to a subsequent suit in Florida to enforce such rights.

## CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved in the case is the first sentence of Article IV, Section 1:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

## STATEMENT OF THE CASE

The Petitioner, Louise Orr Estabrook, sued her former husband, Watson W. Wise, in the Circuit Court of Santa Rosa County, Florida to establish resulting or constructive trusts in mineral interests in various counties in the State of Florida including Santa Rosa County. The Petitioner and her former husband, for all relevant times, have been residents of the State of Texas, a community property state.

Phillips Petroleum Company was joined as a Defendant to set aside, reform or cancel a lease from Defendant Wise to Phillips dated December 8, 1970, relating to one of the mineral interests.

The premise of Petitioner's suit was that the mineral interests were acquired in her former husband's sole name with community funds during marriage, and that a trust arose in her favor either at the time of acquisition in the 1940's (a resulting trust) or that the Defendant concealed the interest (a constructive trust) at the time the Texas divorce commenced



in 1964 and beyond its conclusion in 1965.

Phillips was sued under allegations that it was not an innocent purchaser in that it knew of the Plaintiff's interests and participated in the concealment of such interests when it took its 1970 lease.

Plaintiff's Complaint is set out at 1A through 11A and the Amendment to Complaint (emphasizing fraud on the Plaintiff and the Texas Court perpetrated by Mr. Wise in the Texas divorce proceeding) is set out at 27A - 33A.

Mr. Wise (15A - 19A; 21A - 24A) and Phillips (11A - 15A; 26A - 27A) filed Answers and Amendments to Answers denying that the property was acquired with community funds and asserting seven affirmative defenses each. Some defenses were withdrawn, some were replaced and ten were still before the trial court when it ruled on the motions for summary judgment. For an explanation of each defense and the adjustments to the pleading see 70A - 71A.

For the purposes of this Petition, only Mr. Wise's Affirmative Defense Number 6 need be considered. In that defense he pleaded the prior Texas divorce judgment as a bar (21A - 24A) and that was the specific holding of the court (49A - 53A).

The case was before the trial court, the Circuit Court of Santa Rosa County, Florida, on Defendants' general Motions for Summary Judgment (42A - 44A).

On December 19, 1975, the trial court entered a Summary Final Judgment for the Defendants, Wise and Phillips, (44A - 45A). In this judgment the trial court found that there was no genuine issue of fact and that the Defendants were entitled to final judgment as a matter of law. No specific grounds for the judgment were stated.

Petitioner moved for rehearing, (45 A - 47A), asserting factual and legal grounds in opposition to the summary judgment and noting that the judgment made no specific findings and did not specify upon which of the ten defenses it was based. The Motion for Rehearing also requested that the judgment be reopened to clarify the grounds for the decision. On December 31, 1975, the trial court denied the Motion for Rehearing without permitting further oral argument still without stating a specific ground for the Final Summary Judgment (47A - 48A).

The Plaintiff timely filed an appeal to the intermediate appellate court, the District Court of Appeal, First District of Florida, thereby prosecuting her appeal of right to the highest appellate court of Florida.

The First District Court of Appeal of Florida handed down its decision July 11, 1977 denying the appeal of Petitioner, (49A - 53A). This opinion clearly stated



that Petitioner was barred from proceeding in Florida because of the prior Texas divorce which was found to be res judicata. In the Court's words, "We hold that the doctrine of res adjudicata (sic) controls."

Watson W. Wise and the Petitioner were married in 1930. They were then and remained thereafter residents of the State of Texas. For many years Mr. Wise had been involved in various aspects of the oil business. The mineral interests involved in the suit were acquired in the years 1945 and 1946 in several Florida counties. Title was taken in the sole name of Watson W. Wise.

In 1964 the Petitioner instituted a divorce action against Watson W. Wise in the Court of Domestic Relations of Smith County, Texas (Case No. 64-480). In that proceeding the wife sought a temporary restraining order against Mr. Wise and on July 6, 1964 Mr. Wise was restrained "...from secreting, removing or destroying..." any records of the parties relating to property and assets of the parties (37A - 41A). Further, the Texas Court found, that the temporary restraining order was necessary because,

> "... Defendant would probably do irrevocable injury and damage to the interests of the Plaintiff in such property and records of Plaintiff and Defendant, and will probably secrete, destroy and remove same from the jurisdiction of this Court or beyond the reach of the Plaintiff ...

> It is further ordered ... that said Defendant, Watson W. Wise, shall file with the Clerk... a complete inventory and appraisement, under oath, of all property in his possession or under his control, wherever located and claimed by the Defendant, whether he considers the same as part of the community estate, or otherwise..." (40A).

Mr. Wise on August 6, 1964 filed his sworn "complete inventory" pursuant to the above order, but that inventory failed to include any of the property sued for by Mrs. Estabrook in her instant Florida action. The affidavit portion of that inventory (35A - 37A) and admissions in the record (34A - 35A) established that none of the property sued for was included in the inventory in spite of the court order so requiring.

On May 18, 1965, the Petitioner and her former husband entered into an agreement in the Texas proceeding covering the settlement of various property rights and the preservation of rights with reference to undisclosed property. This agreement was recorded in Official Record Book 644 at Page 538 of the Official Records of the Court of Domestic Relations of Smith County, Texas (9A - 11A). The pertinent part of the agreement provided,

> "... and no issue regarding community property or accounting



> of community funds is to be submitted to the Court and all such issues are to be withdrawn from the pleadings. The Judgment to be entered shall state that the Court is making no adjudication of property rights between the parties. In this connection, if it should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto." (9A, emphasis added).

On May 25, 1965 a valid Final Judgment of Divorce was entered by the Court of Domestic Relations of Smith County, Texas, (23A - 24A). The Judgment recognized[1] the terms of the agreement of the parties in this language:

> "The Court finds that all issues as to the existence or dispostion of community property rights or other property rights, have, by the amended pleadings filed herein, been withdrawn and eliminated from this cause; and the Court is not called upon to adjudicate any

1 The Florida First District opinion stated, "The final judgment of divorce was entered by the Texas court on May 25, 1965, incorporating the terms of the property settlement between the parties." (51A)

property right issues or any property or money accounting issues between said parties as no such issues remain in this cause."
(23A, emphasis added)

In 1970 Mr. Wise leased a valuable Florida interest to Phillips. Phillips conceded during the pre-trial conference that it was not an innocent purchaser without notice of Petitioner's potential interest. (See paragraph 3 of the pre-trial order, 80A).

Mrs. Estabrook testified that at the time of the divorce in 1965, she had no knowledge that these interests were retained. Neither Phillips nor her former husband revealed these interests to her at any time, and she learned from third parties in March of 1972 that these interests existed in her husband's name and that she had a potential interest since they had not been included in the divorce inventory or settlement. Mrs. Estabrook promptly employed counsel who contacted Phillips in April of 1972 and filed a suit in Texas on September 1, 1972. That suit was appealed when the Defendants successfully challenged the jurisdiction of the Texas court to make a determination of Florida mineral interests and accordingly Mrs. Estabrook instituted the instant Florida proceedings in January of 1974. Ultimately, the Texas suit was dismissed while pending on appeal by agreement of the parties who preferred to proceed in Florida where the jurisdiction of the court was not in question, and where Phillips was a proper party defendant.



Although the agreement between the parties in the Texas divorce specifically reserved their rights to pursue rights in any after-discovered property, and although the Texas decree recognized the agreement of the parties and removed adjudication of property rights from the Texas divorce, and although uncontested Texas statutory and case law permits parties to a Texas divorce action to preserve rights and pursue them subsequent to the divorce (74A - 75A), the Florida courts refused to permit this Petitioner to have any remedy, much less a trial in Florida, barring her on the ground that the prior Texas divorce was res judicata to her present action.

## HOW THE FEDERAL QUESTION WAS RAISED

When the court of one state rules directly upon the effect of a judgment of another, full faith and credit is basic to that ruling. That is almost self evident. Tilt v. Kelsey, 207 U.S. 43, 28 S.Ct. 1, (1907) stands for the proposition that if the pleadings present an issue which requires one state to rule on a judicial act of another, the full faith and credit issue is adequately raised whether the issue is constitutionally labelled or not. In that case this Court said:

"They 'specially set up and claimed' a right under those proceedings, though it was not in terms stated to be a right claimed under the Constitution. This, in the case of a judgment of the court of another state, has been held to be a sufficient

compliance with the statute." (at 207 U.S. 51; 28 S.Ct. 3; citing cases.)

This pleading also raised an issue to be determined under the laws of Texas including the Texas law that a divorce does not bar a subsequent action for unadjudicated property. Wallack v. Wallack, 88 S.E.2d 154 (Ga., 1955) is directly on point.

The Florida appellate court acknowledged the Texas law giving rights to Mrs. Estabrook and directly ruled upon the effect of the Texas divorce decree. That was the first time a Florida court specified a ground for its holding, and in immediate response Mrs. Estabrook filed her petition for rehearing (53A - 58A) reasserting her rights under Texas law and the Texas divorce and arguing that the Florida courts were required to give "full faith and credit" to the judgment of a sister state (58A). This labelled the issue which was already unavoidably before the court.

It should be remembered that the Defendant Wise in his Affirmative Defense No. 6, first asserted the prior Texas divorce decree as a bar. Mrs. Estabrook, pursuant to the notice pleading provisions of the Florida Rules of Civil Procedure, simply filed her general denial of this Affirmative Defense (25A). Under such a denial she would have been entitled to prove any defense or avoidance of the affirmative defense at a trial on the merits should that stage have been reached. Her denial necessarily put in issue the full faith and credit to be given the Texas judgment.



The trial judge granted Summary Final Judgment without specifying which of the ten grounds of defense he relied upon. No specification was made in spite of the Petitioner's timely motion to have the grounds stated.

In her Florida appeal, the Petitioner assigned as error the entry of the Final Summary Judgment, 48A, an appropriate assignment of error considering the non-specific nature of that judgment.

In her brief on appeal, Mrs. Estabrook again set forth and relied upon the settlement agreement reached with her former husband and the Texas Final Judgment of Divorce (65A - 66A). Mrs. Estabrook also set out in her brief her reliance upon the general community property law of Texas to support her claim. (69A - 70A).

In her Reply Brief to the First District Court of Appeal, Mrs. Estabrook responded to a claim that the Texas decree barred her action by correctly arguing that the Texas decree should not be given greater impact in Florida than it would receive in Texas. She also cited Texas statutes and cases permitting a divorced person to litigate property rights subsequent to the divorce suit. (73A - 79A)

Thus Petitioner asserted in her pleadings initially and reiterated on her appeal her rights under the law of Texas, necessarily placing the issue of full faith and credit to be given the Texas law and the judgment of the Texas court before the trial and appellate courts of Florida.

The opinion of the First District Court of Appeal was the first specific ruling by a Florida court on an identified ground of defense, and that opinion held directly that the action was barred by res judicata because of the prior Texas divorce. That decision unavoidably determined the faith and credit to be given the Texas judgment.

Mrs. Estabrook's timely Petition for Rehearing directed to that opinion specifically contested the applicability of the doctrine of res judicata because "... it attempts to accord the Texas divorce decree more weight than it would be given in the State of Texas." and because "... Texas law provides that the parties to a divorce proceeding may litigate their rights to community property subsequent to their divorce." Petitioner also cited a case from the Second District of Florida which "... recognized the doctrine of res adjudicata as appropriate to the judgment of a sister state and that such judgments were entitled to full faith and credit.", a reference to the familiar provision of the United States Constitution. (See Petition for Rehearing 53A - A.)

The raising of a constitutional issue does not have to be done in any particular form of words, but the only requirement is that the issue be brought to the attention of the state court with fair precision in due time, and if the record as a whole shows this was done expressly or by clear intendment, the claim is adequately raised. Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 (1969); cf. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973).



There is ample authority from this Court for the position that the issue is timely raised if raised and considered on appeal. Whitfield v. State of Ohio, 297 U.S. 431, 56 S.Ct. 532 (1936); Sully v. American National Bank, 178 U.S. 289, 20 S.Ct. 935 (1900).

There is even authority for raising the issue on a petition for rehearing on appeal where that is the first stage when the question reasonably could have been specifically raised, and where the state court considered the matter. Great Northern Ry Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 53 S.Ct. 145, (1932): Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779 (1914). Petitioner's petition for rehearing to the District Court of Appeal was "considered" but denied.

Upon denial of the Petition for Rehearing, Petitioner, under limited Florida constitutional authorization for certiorari to the Supreme Court, petitioned that court for such a writ (60A - 63A). Petitioner was required to show that the decision of the First District of Appeal conflicted with prior decisions of Florida appellate courts or the Florida Supreme Court. Petitioner therefore argued that the decision conflicts with other Florida cases, including "... Newton v. Newton, 245 So.2d 45 (Fla. 1971) which recognized that divorce decrees of sister states are entitled to full faith and credit under the United States Constitution Section 1, Article IV." (62A)

The issue of Petitioner's constitutional rights to the protection of her interests arising under Texas law and the Texas decree was made at every stage of the case. The issue framed by the assertion of the Texas decree as a defense inherently involved a determination of the faith and credit to be given that decree whether so labelled or not. The specific point was timely urged at the first feasible stage of the proceedings, when the Florida appellate court specified which of the several defenses its decision was based upon. Thus the federal question was raised and preserved.

## THE FEDERAL QUESTION IS SUBSTANTIAL AND IMPORTANT

This writ should be granted since the Florida courts have decided a federal question of substance in a way not in accord with the applicable decisions of this court. The decision that the Texas divorce decree is res judicata in Florida denies Petitioner her constitutional right to have the Texas divorce decree and her rights under the laws of Texas given full faith and credit in Florida.

The First District Court of Appeal of Florida, in its opinion, recognized that Petitioner had continuing rights under Texas law saying:

> "The Texas court has jurisdiction pursuant to the agreement of the



> parties which was incorporated in its 1965 divorce decree for the parties to further 'pursue his or her rights or remedies thereto.' " (52A)

This part of the opinion is in complete accord with Petitioner's position on Texas law that a divorce decree which does not purport to dispose of all community property interests does not prevent a party from later claiming a community property interest in some asset not specifically disposed of by the parties or by the divorce decree. (See, among those cases cited to the Florida courts, Blakely v. Herring, 374 S.W. 2d 677 (CCA Tex. 1964), Thompson v. Thompson, 500 S.W. 2d 203 (CCA Tex. 1973).

Nonetheless, the Florida courts held that the Texas divorce decree was res judicata and prohibits Mrs. Estabrook from seeking to establish her community property interests in the Florida property which is the subject of this litigation. The decisions of the Florida courts conflict with prior decisions of this court protecting the constitutional rights of citizens to have full faith and credit given to decrees and laws of sister states.

Article IV, Section I of the Constitution affords full faith and credit to divorce decrees. Venator v. Venator, 512 S. W. 2d 451 (1 DCA Mo. 1974). In fact a significant percentage of the cases decided by this Court in application of the full faith and credit clause involve divorce decrees, and many cases cited hereafter fall in that catagory.

The Constitution requires that a state give not some but full faith and credit to

decrees of other states. Davis v. Davis, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26 (1939).

The full faith and credit to which a judgment is entitled is the credit in the state from which it was taken, not the credit that under other circumstances and conditions it might have had. (See Morris v. Jones, 67 S.Ct. 451, 329 U.S. 545, 91 L. Ed., 488, reh. den. 67 S.Ct. 858, 330 U.S. 854, 91 L.Ed. 1296.). This rule applies even though the foreign judgment offends the public policy of the local sovereign and even though the claim would not be enforceable in the forum. Roche v. McDonald, 275 U.S. 449, 48 S.Ct. 142, 72 L.Ed. 365 (1928).

One of the clearest statements of the duty of a state court to give full faith and credit to the judgment of a sister state was set forth in Tilt v. Kelsey, supra:

> "When therefore we come to consider what faith and credit must be given to these judicial proceedings of New Jersey (the foreign decree), we must first ascertain what effect that state attached to them. The statute enacted to carry into effect the constitutional provision provided that they should have, in any court within the United States, such faith and credit 'as they have by law or usage in the courts of the state from which they are taken.' ... They can have no greater or less or other effect in other courts than in those of their own state." (207 U.S. at 57, 28 S.Ct. at 6.)

The limited role of the forum state in giving full faith and credit to a foreign



decree was described by Justice Story in Mills v. Duryee, 7 Cranch 481, 3 L.Ed. 411 (1813):

> "It remains only there to inquire in every case what is the effect of a judgment in the state where it is rendered." (7 Cranch at 484, 3 L.Ed. at 413.)

Furthermore, the decision under review raises a federal question of substantial public importance as this court has previously held in Titus v. Wallick, 306 U.S. 282, 59 S.Ct. 557, 83 L.Ed. 653 (1939). Also this substantial federal question is reviewable by this court on certiorari. In Riley v. The New York Trust Co., 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885 (1942), reh. den. 315 U.S. 829, 62 S.Ct., 903, this court stated:

> "By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here." (315 U.S. at 349, 62 S.Ct. at 612.)

Furthermore, the only remedy for an erroneous denial of full faith and credit is by petition for certiorari to this court. (See Porter v. Wilson, 419 F.2d 254 (9 Cir. 1969), cert. den. 397 U.S. 1020 90 S.Ct. 1260 (1970).)

Thus Petitioner asserts that a substantial federal question of public importance is raised by this Petition which is the sole basis for relief from the erroneous decisions of the Florida courts.

The decision by the Florida courts sought to be reviewed, refusing to give the Texas decree the same force and effect it would have in that state, violates not only petitioner's constitutional guarantees under Article IV, Section 1 of the Constitution, but also conflicts with our federal system of jurisprudence. The Texas court in the divorce action had personal jurisdiction of the parties. The Florida courts in this proceeding had both jurisdiction of the parties and in rem jurisdiction over the real property in which Mrs. Estabrook sought to establish a community property interest. Petitioner did not claim that the Texas divorce decree automatically affected the title to Florida real property or established interests superior to that of a bona fide purchaser without notice of her claim but rather sought to establish a resulting trust in that property arising out of her communnity property rights. Texas has a legitimate interest in establishing and protecting the property rights of its domiciliaries arising out of their marital status, and Florida has a constitutional obligation to respect and protect those rights.

This court in Cheever v. Wilson, 9 Wall. 108, 19 L.Ed. 604 (1869) considered the effect of an Indiana judgment where that court had personal jurisdiction of the parties in a divorce suit, but where the decree established property rights of the parties to property located in the District of Columbia. In that proceeding the court concluded:

> "The decree rendered in Indiana, so far as it related to the real property in question, could have no extra-territorial effect; but, if valid, it



> bound personally those who were parties in the case, and could have been enforced in the situs rei, by the proper proceedings conducted there for that purpose." (Citations omitted) (9 Wall. at 121, 19 L.Ed. at 607).

That rule applies in this action and Mr. Wise is personally bound by the Texas divorce decree and his agreement entered therein preserving Mrs. Estabrook's right to establish a community property interest in this Florida real estate. Florida was obligated to protect her rights, and having refused to do so, this Court is her only resort.

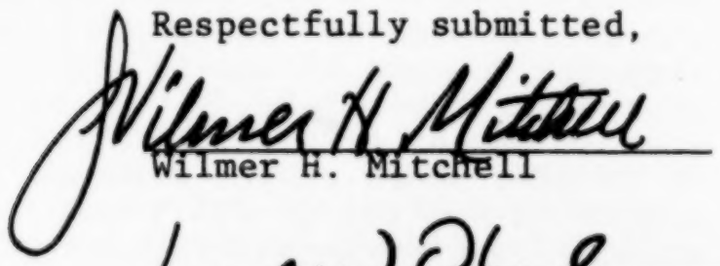
The implications of the challenged Florida decision, if allowed to stand, are of broad and substantial importance. Since it is domicile which empowers a court to dissolve a marriage (Williams v. State of North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, reh. den. 325 U.S. 895, 65 S.Ct. 1560), domiciliaries of community property states, such as Texas, must sue for divorce in that state. However, if they are unaware of assets located in Florida and therefore do not dispose of them in the divorce, Florida will refuse to protect those rights although (1) they agreed in writing to split their causes of action for divorce and settlement of some property rights; (2) they specifically preserved the right to pursue after-discovered property; (3) they removed adjudication of all property rights from the divorce; (4) the judgment incorporated the terms of their agreement; (5) the community property laws of their domicile permitted all these acts; (6) they had no knowledge of the existence of these interests; and even though (7) one spouse

fraudulently concealed the disputed interests from the other and the court.

The Florida court's refusal to enforce rights created by and judgments rendered by sister states defeats the purpose of the full faith and credit clause and system of federal jurisprudence which is to meld independent states into a nation in which all citizen's rights arising under state laws and judicial proceedings will be respected and enforced in sister states. Johnson v. Muelberger, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552 (1951); Pink v. A.A.A. Highway Express, 314 U.S. 201, 62 S.Ct. 241, 86 L.Ed. 152 (1939).

This Court should issue its Writ of Certiorari to protect the valuable property rights of Petitioner and all other similarly situated residents of community property states who, in reality, have no other way of obtaining relief from the erroneous Florida holding.

Respectfully submitted,



Wilmer H. Mitchell

Lawrence W. Oberhausen
Attorneys for Petitioner
MITCHELL & OBERHAUSEN, P. A.
130 East Government Street
Pensacola, Florida 32501
904/434-3571



# APPENDIX

Omissions of irrelevant material are indicated in this Appendix by three asterisks, "* * *", and a bracketed insert follows each omission explaining the omission.

The case style of the case is set out fully in the Complaint and omitted thereafter except as to orders and decisions which are shown verbatim.

Certificates of Service are omitted, but the date of service are shown parenthetically.

INDEX TO APPENDIX:

PROOF OF SERVICE

All parties required to served with the above Petition and Appendix have been served. Three copies were personally delivered to W. Spencer Mitchem, Beggs & Lane, 700 Brent Building, Pensacola, Florida 32501, Attorney for Watson W. Wise, February 27, 1978 and three copies were mailed by regular U.S. mail, postage pre-paid to William F. McGowan, Jr., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Post Office Box 3239, Tampa, Florida 33601, mailed February 27, 1978. Forty copies were hand delivered to the Clerk of this Court and filed before midnight February 28, 1978.

The undersigned is a member of the bar of this Court and has entered his appearance in the cause.

Wilmer H. Mitchell
Wilmer H. Mitchell
Of Counsel for Petitioner



IN THE CIRCUIT COURT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

| | | |
|---|---|---|
| LOUISE ORR ESTABROOK, | : | |
| Plaintiff, | : | COMPLAINT |
| vs. | : | Case No. 74-C-53 |
| WATSON W. WISE and PHILLIPS PETROLEUM COMPANY, a Corporation, | : | |
| Defendants. | : | |

Comes now the Plaintiff, LOUISE ORR ESTABROOK, by her undersigned attorneys, and makes this her Complaint against the Defendants, WATSON W. WISE and PHILLIPS PETROLEUM COMPANY, a corporation, and says:

COUNT I

(Against Watson W. Wise)

1. That the Plaintiff and Defendant, Watson W. Wise, are both natural persons over the age of Twenty-one (21, years and residents of Tyler, Smith County, Texas. Phillips Petroleum Company, sometimes referred to hereafter as "Phillips", is a corporation chartered under the laws of Oklahoma, qualified to do business in the State of Florida which maintains an office in Santa Rosa County, Florida.

2. This is a suit to impose a resulting trust in favor of the Plaintiff in mineral rights and other interests in certain Florida real property presently in the name of the Defendant, Watson W. Wise, a portion of which has purportedly been leased to Phillips Petroleum Company. In addition or in the alternative, the Plaintiff seeks to have her title to one-half (1/2) interest in the mineral and other rights confirmed, to have such title conveyed to her, to set aside the purported lease to Phillips, or in the alternative to have her declared a one-half (1/2) owner of the lessor's rights under the Phillips lease, and in the alternative for damages against the Defendants and for general relief. The amount in controversy exceeds the minimum jurisdictional requirements of this Court.

3. The Florida properties in question are in several counties of Florida as outlined below, and a major portion of said properties lies in Santa Rosa County, Florida.

4. On May 21, 1930, Louise Orr Estabrook and Watson W. Wise were duly and legally married in Fort Worth, Texas. They lived together thereafter as husband and wife until the summer of 1964, when they separated. On July 6, 1964, the Plaintiff, then known as "Louise Orr Wise", filed her petition for divorce in the Court of Domestic Relations, Smith County, Texas, being Case No. 64-480. Valid personal service was obtained upon Watson W. Wise in such action and he was represented by counsel therein.



5. During the course of their marriage, Louise Orr Estabrook and Watson W. Wise had accumulated a substantial amount of community property, the State of Texas being at all times relevent hereto a community property state. During the pendency of the said suit the identity and division of community assets was a matter of some dispute between the parties, and on August 6, 1964, pursuant to an order of the Court of Domestic Relations of Smith County, Texas, Watson W. Wise filed in said cause a sworn inventory and partial appraisal, sworn to be a "complete inventory" of all property that Watson W. Wise owned at that time, whether of a community nature or claimed as the separate property of Watson W. Wise. None of the mineral rights or other interests sued for in this cause were listed in said inventory.

6. That during the course of the subject divorce proceedings, Plaintiff and Defendant, Watson W. Wise, from time to time divided various items of community property and finally entered into an agreement in writing, dated May 18, 1965, a copy of which is attached hereto as Exhibit "A" and made a part hereof for all purposes, whereby they and their attorneys represented to one another that all of the community property known to them had been disclosed and divided; that any issue concerning a division of the community property was to be withdrawn from the consideration of the Court and providing additionally as follows:

"In this connection, if it should

hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto."

The Plaintiff and Watson W. Wise were divorced by a Judgment entered in the said cause May 25, 1965.

7. That on or about March 2, 1972, Plaintiff was contacted by certain persons in the oil and gas industry seeking to lease various mineral interests in the properties hereinafter described for oil and gas development who advised Plaintiff that mineral and other interests in said property had been acquired by the Defendant, Watson W. Wise, in Florida during the years 1944 to 1946 and in the State of Alabama during the same period, all of which interests were acquired while Plaintiff was duly and legally married to the Defendant.

8. The existence of the subject interests was never mentioned or disclosed during the aforementioned divorce proceeding, nor were they listed and described in the sworn inventory filed by the Defendant in said divorce proceeding and that it was only upon being contacted with reference to leasing the same that Plaintiff discovered that such interests had been acquired during her marriage to Defendant, Watson W. Wise.



9. Specifically, Plaintiff alleges that all of the interests in lands in various counties in the State of Florida described in this paragraph were acquired with the community funds of Plaintiff, Louise Orr Estabrook and Defendant, Watson W. Wise, during their marriage and that each conveyance of the properties named only the Defendant, Watson W. Wise, as the sole grantee. The interests are undivided mineral rights, mineral deeds or warranty deeds in the following described real property:

In the following parcel descriptions, N = North, S = South, E = East and W = West.

PARCEL 1

In Santa Rosa County, Florida, to-wit:
TOWNSHIP 4 NORTH, RANGE 29 WEST
Section 11: W 1/2 SE 1/4

* * *

[Omitted are lengthy legal descriptions of property in Santa Rosa, Walton, Okaloosa and Holmes counties in Florida]

10. That said purchases made during the marriage were presumptively from the community funds of Plaintiff and her former husband, Watson W. Wise.

11. That although the State of Florida has not adopted the community

property system and the subject property hereinabove referred to is not community in character under the laws of the State of Florida, nevertheless the properties were acquired by the Defendant, Watson W. Wise, and taken in his name as the sole grantee with the use of community funds, one-half (1/2) of which belonged to the Plaintiff, and that under the law of Florida a resulting trust arose at the time of the acquisition of such title and Defendant, Watson W. Wise, thereupon became a resulting trustee for the ocmmunity estate of Plaintiff and Defendant, with Plaintiff being the beneficial owner of an undivided one-half thereof.

12. That the aforementioned interests in real property in the State of Florida were never accounted for on the termination of the marriage between Plaintiff and Defendant, Watson W. Wise, and that although Plaintiff has demanded a conveyance of her interests in such property after the discovery of the existence of the same, the Defendant, Watson W. Wise, has failed and refused to make such conveyances and in fact, Plaintiff has discovered that Defendant is claiming the same as his sole and separate property.

WHEREFORE, under Count I the Plaintiff prays for relief against the Defendant, Watson W. Wise by decree of this court establishing that Defendant, Watson W. Wise holds one-half (1/2) of his interests in the above Florida lands as a trustee under a resulting trust for the benefit of the Plaintiff; that should personal service be obtained on said Defendant, he be ordered to convey to the



Plaintiff her said interests so established or that the decree of this court effect such conveyance; and in the alternative, should some or all of said interests have been conveyed away or lost to the Plaintiff, that a judgment for money damages be awarded Plaintiff against the Defendant, Watson W. Wise, and also for a judgment for damages for Plaintiff's share of any rents, bonuses or royalties received by Defendant, Watson W. Wise, which rightfully were the property of the Plaintiff, and the Plaintiff prays for such other and general relief as may be necessary in the premises and for such interest and costs of court as may be due her, and for a jury trial of all issues so triable.

## COUNT II

(Against Phillips Petroleum Company)

13. Plaintiff realleges the matters and things contained in Count I.

14. On or about December 8, 1970, the Defendant, Watson W. Wise, joined by his present wife, Emma F. Wise, executed and delivered a lease of mineral interests to Phillips Petroleum Company, covering the following described tracts of land in Santa Rosa County, Florida:

TOWNSHIP 2 NORTH, RANGE 28 WEST
Section 16: SE 1/4 NE 1/4

* * *

[Lengthy legal description omitted]

Said lease is recorded in Official Records Book 221 at page 14 of the public records of Santa Rosa County, Florida.

15. At the time of the execution of said lease the Defendant, Phillips Petroleum Company had actual or legal knowledge or should have known, of the rights of the Plaintiff in said interests leased. Nonetheless, the said lease was made solely for the benefit of Defendant, Watson W. Wise, and in his name.

16. The Plaintiff has the right either to have the lease declared void, or to be declared the beneficial owner of one-half (1/2) interest in the lease, or for damages against the Defendants for any payments made or to be made, and any other damages incurred by Plaintiff as a result of said lease.

WHEREFORE, Plaintiff prays for a judgment and decree of this court cancelling and declaring void the said Phillips lease, or adjudging the Plaintiff to be the owner of one-half (1/2) interest in said lease, and requiring appropriate conveyances from Defendants to Plaintiff of her said interests, or that such conveyances be made by the decree of this court, or for damages, including interest and costs against the Defendants, and for a jury trial of all issues so triable.

HOLSBERRY, EMMANUEL, SHEPPARD
MITCHELL & CONDON
34 West Government Street
Post Office Box 1271
Pensacola, Florida 32596
Attorneys for Plaintiff



NO. 64-480

LOUISE ORR WISE ) Book 644 Page 538
)In The Court of Domestic
v. ) Relations In And For
) Smith County, Texas
WATSON W. WISE )

This AGREEMENT made and entered into by and between WATSON W. WISE and LOUISE ORR WISE this the 18th day of May, A.D., 1965;

W I T N E S S E T H:

It is hereby represented by Watson W. Wise to Louise Orr Wise and her attorney, W.F. Weeks, that all community property of every kind and character, heretofore existing to the marriage of the said Watson W. Wise and Louise Orr Wise, known to Watson W. Wise has been partitioned by written agreements heretofore executed, and no issue regarding community property or accounting of community funds is to be submitted to the Court and all such issues are to be withdrawn from the pleadings. The Judgment to be entered shall state that the Court is making no adjudication of property rights between the parties. In this connection, if it should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be entitled to pursue his or her rights and remedies thereto. Louise Orr Wise, Plaintiff, and Watson W. Wise, Defendant, the parties hereto, now assert that they have no actual knowledge at this time of any community property existing to said marriage which now remains undivided.

Exhibit "A"

W.F. Weeks, Attorney for Plaintiff, and Jack W. Flock, Attorney for Defendant, assert that they have no actual knowledge at this time of any community property existing to the marriage of the said Watson W. Wise and Louise Orr Wise which now remains undivided.

s/ Louise Orr Wise

s/ Watson W. Wise

s/ W.F. Weeks

s/ Jack W. Flock

STATE OF TEXAS )

COUNTY OF SMITH )

BEFORE ME, the undersigned authority on this day personally appeared LOUISE ORR WISE, wife of WATSON W. WISE, know to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privly and apart from her husband, and having it full explained to her, she, LOUISE ORR WISE, acknowledged such instrument to be her act and deed, and she declared that she had willingly signed it for the purposes and consideration therein

EXHIBIT "A"



expressed, and that she did not wish to retract it.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 18 day of May, 1965.

s/ Edgar A. Turman
Notary Public in and
for Smith County, Texas

STATE OF TEXAS )
COUNTY OF SMITH )

BEFORE ME, the undersigned authority, on this day personally appeared WATSON W. WISE, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed it for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 18 day of May, 1965.

s/ Edgar A. Turman
Notary Public in and
for Smith County, Texas

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IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, STATE OF FLORIDA

* * *

[Case style omitted]

MOTION TO STRIKE, ANSWER, AND AFFIRMATIVE DEFENSES OF DEFENDANT, PHILLIPS PETROLEUM COMPANY

* * *

[Motion to Strike omitted]

ANSWER

For its answer to the portion of the complaint directed against it (Count II), Defendant, Phillips Petroleum Company, says as follows:

1. Admits the allegation of paragraph 1 of the complaint insofar as that paragraph states that the Plaintiff and Defendant, Watson W. Wise, are both natural persons over the age of 21 years, that defendant, Phillips Petroleum Company, is a corporation chartered under the laws of the State of Oklahoma and is qualified to do business in the State of Florida. Defendant denies that it maintains an office in Santa Rosa County, Florida, and states that it is without knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph 1.

2. Admits that a portion of the mineral rights has been leased to defendant, but defendant denies that a resulting trust can be imposed on a portion of the minerals so leased or that facts have been alleged to allow these to be set aside. Otherwise denied.

3. Admits each and every allegation of paragraph 3.

4. Defendant is without knowledge of the allegations of paragraph 4, except that defendant admits that Plaintiff and Watson W. Wise were married in 1939 and were subsequently separated and divorced.



5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5.

6. Defendant is without knowledge or information sufficient to form a belief as to the trust of the allegations of paragraph 6, except defendant admits a final divorce was granted to the parties in 1965.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8.

9. Admits that each conveyance of the minerals named only Watson W. Wise as the sole grantee. Defendant denies that the mineral interest which it has leased was obtained with "community funds." Defendant is without knowledge as to all other factual allegations of paragraph 9.

10. Defendant denies the allegations of paragraph 10.

11. Admits that the subject property is not community property under Florida law, and defendant denies all remaining allegations of paragraph 11.

12. Defendant is without knowledge or information sufficient to form a belief as

to the truth of the allegations of paragraph 12.

13. See paragraphs numbered 1-12.

14. Admits each and every allegation of paragraph 14.

15. Denies each and every allegation of paragraph 15 of the complaint, except that defendant admits that its lease was made with the record title owner, Watson W. Wise.

16. Denies each and every allegation of paragraph 16.

* * *

[Affirmative Defenses 1, 2 and 5 were withdrawn and 3 and 4 were withdrawn and replaced, hence all are omitted.]

SIXTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering any interest in the property described in the complaint in that she bases her claim for relief upon a community property agreement made and entered into in the State of Texas and upon the community property law of Texas, which have no effect in Florida or upon real property located in Florida.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering any interest in the minerals leased to



defendant since the minerals leased were not purchased in 1945 with the "community funds" of Watson W. Wise and Louise Orr Wise and were always the separate property of Watson W. Wise under the community property laws of the State of Texas.

s/ John Peter Kirtz, Jr.
Carlton, Fields, Ward,
Emmanuel, Smith & Cutler
P. A.
Post Office Box 12426
Pensacola, Florida 32582
Attorneys for Phillips
Petroleum Company

(Served February 26, 1974)

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IN THE CIRCUIT COURT OF
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

MOTION TO STRIKE, ANSWER, AND AFFIRMATIVE DEFENSES OF DEFENDANT, WATSON W. WISE

* * *

[Motion to Strike omitted]

ANSWER

Subject to his motion to strike, as stated above, defendant Watson W. Wise, answers the portion of the complaint directed against him (Count I), saying as follows:

COUNT I

1. Defendant admits that he is a natural person over the age of twenty-one years, and a resident of Tyler, Smith County, Texas.

2. Defendant admits that a portion of the mineral rights have been leased to Phillips Petroleum Company, but denies that a resulting trust can be imposed on the minerals described in the complaint or that facts have been alleged to allow the leases described to be set aside. All other allegations of Paragraph 2 are denied.

3. Admitted.

4. Defendant admits that he was duly and legally married to Louise Orr Estabrook on May 21, 1930, and that she filed a petition for divorce against him on July 6, 1964, in Smith County, Texas; all other allegations of Paragraph 4 are denied.

5. Defendant admits that at the time of his divorce from Louise Orr Estabrook, certain of the property held jointly by them was divided between them, all other allegations of Paragraph 5 are denied.

6. Defendant admits that at the time of the termination of his marriage to Louise Orr Estabrook, certain of the property held jointly by them was divided between them; all other allegations of Paragraph 6 are denied.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7 of the complaint and therefore denies the same.

8. Denied.



9. Defendant admits that each conveyance of the minerals named only this defendant, Watson M. Wise, as the sole grantee. This defendant denies that the mineral interests which are described in the complaint were obtained by him with "community funds". This defendant is without knowledge as to the remaining allegations of Paragraph 9 and therefore denies the same.

10. Denied.

11. Defendant admits that the subject property is not community property under the law of the State of Florida; and denies all remaining allegations of Paragraph 11.

12. Defendant admits that he has not at any time conveyed the property described in the complaint to Louise Orr Estabrook; denies that the said property was at any time community property and further denies all remaining allegations of Paragraph 12 of the complaint.

COUNT II

13. See this defendant's answers to Paragraphs 1 through 12 of the complaint.

14. Admitted.

15. Defendant is without knowledge as to the allegations of Paragraph 15 and therefore denies the same.

16. Denied.

## FIRST AFFIRMATIVE DEFENSE

Defendant Wise alleges that the plaintiff had knowledge of his ownership, as separate property, of the property described in the complaint during the years 1964, 1965 and prior thereto, and that this action is barred by applicable statutes of limitation, and that each alleged cause of action, claim or lien did not accrue within the time prescribed by law for them prior to the commencement of this action.

## SECOND AFFIRMATIVE DEFENSE

Defendant alleges that each alleged cause of action, claim or lien has lapsed because the plaintiff has been guilty of laches in that twenty-nine years have elapsed since the mineral conveyances and nine years since the divorce decree; during all of which time the plaintiff had knowledge of the ownership of the minerals described in the complaint as the separate property of Watson W. Wise; and that rights have now accrued to innocent, intervening and bona fide purchasers who had no actual or implied notice of any claim of the plaintiff to said minerals and that this defendant has further changed his position in regard to said minerals so that it is, at this time, inequitable and unjust for plaintiff to assert any rights thereto.

* * *

[Withdrawn, hence omitted]



## FOURTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering any interest in the property described in the complaint because the same was not purchased with "community funds" of Watson W. Wise and Louise Orr Wise and was always the separate property of Watson W. Wise under the community property laws of the State of Texas.

## FIFTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering any interest in the property described in the complaint in that she bases her claim for relief upon a community property agreement made and entered into in the State of Texas and upon the community property law of Texas, which have no effect in Florida or upon real property located in Florida.

— — —

I hereby certify that a copy of the foregoing was furnished by delivery to Wilmer H. Mitchell, Esquire, of Holsberry, Emmanuel, Sheppard, Mitchell & Condon, Attorneys for Plaintiff, 34 West Government Street, Pensacola, Florida, and upon John Peter Kirtz, Jr., of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Attorneys

for Phillips Petroleum Company, 2 North Palafox Street, Pensacola, Florida, this 4th day of March, 1974.

s/ W. Spencer Mitchem
Beggs, Lane, Daniel, Gaines & Davis
700 Brent Annex Building
Pensacola, Florida
Attorneys for Defendant, Watson W. Wise

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IN THE CIRCUIT COURT OF
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

REPLY TO AFFIRMATIVE DEFENSES

The Plaintiff files this her reply to the affirmative defenses of the Defendants as follows:

A. As to the affirmative defenses of Defendant WATSON W. WISE, they are:

1. First affirmative defense denied.
2. Second affirmative defense denied.
3. Third affirmative defense denied.
4. Fourth affirmative defense denied.
5. Fifth affirmative defense denied.

B. As to the affirmative defenses of Defendant PHILLIPS PETROLEUM COMPANY, they are:



1. First affirmative defense denied.
2. Second affirmative defense denied.
3. Third affirmative defense denied.
4. Fourth affirmative defense denied.
5. Fifth affirmative defense denied.
6. Sixth affirmative defense denied.
7. Seventh affirmative defense denied.

(Served May 22, 1974)

s/ Wilmer H. Mitchell
HOLSBERRY, EMMANUEL, SHEPPARD, MITCHELL & CONDON
34 West Government St.
P. O. Crawer 1271
Pensacola, Florida
Attorneys for Plaintiff

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IN THE CIRCUIT COURT OF
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

AMENDMENT TO ANSWER

Comes now defendant, Watson W. Wise, and amends his motion to strike, answer and affirmative defenses, as filed herein on March 4, 1974, to add the following affirmative defenses.

SIXTH AFFIRMATIVE DEFENSE

That this action is barred by virtue of

the final decree of divorce entered in the Court of Domestic Relations in and for Smith County, Texas, in that certain case bearing No. 64-480 in which Louise Orr Wise, now Louise Orr Estabrook, was the plaintiff and Watson W. Wise, defendant, copy of which final judgment is attached hereto, marked Exhibit "A" and by this reference made a part hereof.

SEVENTH AFFIRMATIVE DEFENSE

That any interest of plaintiff Louise Orr Estabrook in the property which is the subject matter of this litigation is limited to one-half of the value of said property either (a) at the time said property was purchased by defendant Watson W. Wise; or (b) at the time of the entry of the final decree of divorce between the said Louise Orr Wise and Watson W. Wise on May 25, 1965, plus interest on said amount as provided by law.

(Served August 26, 1975)

s/ W. Spencer Mitchem
Beggs, Lane, Daniel, Gaines, & Davis
Post Office Box 32950
Pensacola, Florida
Attorneys for said defendant



IN THE COURT OF DOMESTIC RELATIONS
SMITH COUNTY, TEXAS

LOUISE ORR WISE )
)
Vs. )
)
WATSON W. WISE ) No. 64-480

JUDGMENT

On this May 25, 1965, the above-entitled and numbered cause came on regularly for trial. The Plaintiff appeared in person and by her attorney, and the Defendant, having filed an Answer herein, appeared through his attorney of record. The parties announced ready for trial and, no jury being demanded, the cause was submitted to the Court.

The Court, after hearing the evidence and considering the law of the case, finds that the Plaintiff, Louise Orr Wise, is entitled to an absolute divorce from the Defendant, Watson W. Wise, and to have the bonds of matrimony heretofore existing between them dissolved.

The Court finds that all issues as to the existence or disposition of community property rights, or other property rights, have, by the amended pleading filed herein, been withdrawn and eliminated from this cause; and the Court is not called upon to adjudicate any property right issues or any property or money accounting issues between said parties as no such issues remain in this cause. The only issue remaining in this cause

is the issue of whether the Plaintiff should be granted an absolute divorce from the Defendant.

The Court finds that the children of Plaintiff and Defendant have attained their seniority and are of adult age.

It is, therefore, ordered, adjudged and agreed that Plaintiff, Louise Orr Wise, is hereby granted an absolute divorce from the Defendant, Watson W. Wise, on the grounds of cruel and excessive treatment of such a nature as to render their further living together insupportable, and the bonds of matrimony existing between them are hereby, in all things, dissolved.

All costs of suit are hereby adjudged against the Defendant, Watson W. Wise, for which the officers of this Court may have their execution.

s/ Craven Beard
Judge

APPROVED:

s/ W. F. Weeks
Attorney for
Plaintiff

APPROVED as to form:

s/ Jack W. Flock
Attorney for
Defendant

Exhibit "A"



IN THE CIRCUIT COURT
FOR SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

CASE NO. 74-C-53

REPLY TO ADDITIONAL
AFFIRMATIVE DEFENSES

The Plaintiff replies to the affirmative defenses served by the Defendant Watson W. Wise August 26, 1975, and says:

1. The sixth affirmative defense is denied.

2. The seventh affirmative defense is denied.

(Served September 29, 1975)

s/ Wilmer H. Mitchell
130 East Government St.
Pensacola, Florida 32501
Attorney for Plaintiff

IN THE CIRCUIT COURT FOR
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

MOTION OF DEFENDANT PHILLIPS PETROLEUM COMPANY TO AMEND THIRD AND FOURTH AFFIRMATIVE DEFENSES

* * *

[Motion to Amend was granted and is omitted]

THIRD AFFIRMATIVE DEFENSE

Plaintiff has been guilty of laches in that twenty-nine (29) years have elapsed since the divorce decree, during the passage of which time numerous key witnesses have died, many material socuments have been destroyed or lost, and this defendant has relied to its detriment upon the record title of the codefendant, Watson W. Wise, in purchasing the interests which are the subject of this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff is estopped to deny the validity of the oil, gas and mineral leasehold interests covering the minerals described in par. 14 of the Complaint because of her rights to the subject property, because of the negligence of the plaintiff and her representatives in failing to ascertain at the time of her divorce proceedings the identity of all property interests of defendant Watson W. Wise in which plaintiff



might claim an interest, and because of the intervening rights of defendant Phillips Petroleum Company resulting from defendant Phillips detrimental reliance upon the record title of defendant Wise, which detrimental reliance would not have occured but for plaintiff's delay and negligence.

CARLTON, FIELDS, WARD,
EMMANUEL, SMITH &
CUTLER, P. A.
P. O. Box 3239
Tampa, Florida 33601
Attorneys for Phillips
Petroleum Co.

By s/ William S. McGowan,
Jr.

(Served November 10, 1975)

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IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

AMENDMENT TO COMPLAINT AND REPLY TO ADDITIONAL AFFIRMATIVE DEFENSES

Comes now he Plaintiff, Louise Orr Estabrook, by her undersigned attorneys and amends her complaint as set forth

below and replies to substitute affirmative defenses 3 and 4 of Phillips Petroleum Company and says:

The complaint of the Plaintiff is amended so that the prayer for relief under Count II thereof is amended to read as follows:

"WHEREFORE, plaintiff prays for a judgment and decree of this Court cancelling. declaring void and/or reforming the said Phillips lease as to the interest of the Plaintiff in the property so leased, or in the alternative adjudging the Plaintiff to be the owner of one-half interest in said lease; and further for a judgment requiring appropriate conveyances from the Defendants to the Plaintiff of her said interest, or that such conveyances be made by decree of this Court, and for a judgment for such damages as may be due the Plaintiff from the Defendants, and for an order of this Court requiring all monies held or which may be held for the rightful owner of the interests in this suit by the Defendants or their representatives or agents to be paid forthwith to the Plaintiff with interest as allowed by law, or in the alternative for a judgment for damages for such monies and interest."

Plaintiff further amends her complaint to add Count III as follows:



COUNT III
(Against Watson W. Wise and
Phillips Petroleum Company )

17. The Plaintiff realleges the matters and things contained in Counts I and II except insofar as said allegations may conflict with the allegations of this Count, in which event the allegations of Count are in the alternative to Counts I and II.

18. This is a suit to impose a constructive trust in favor of the Plaintiff and to set aside, cancel or reform a lease to Phillips of the mineral rights and other interests in certain Florida real property described above presently in the name of the Defendants or either of them. The amount in controversy exceeds the minimum jurisdictional requirements of this Court.

19. During the pendency of the Texas divorce between the Plaintiff and the Defendant, Watson W. Wise, the said Defendant did intentionally, willfully and fraudently conceal from the Plaintiff and her attorney the fact that he had title in his own name to the interests in Florida minerals and realty described above and that such properties were community property of the Plaintiff and Watson W. Wise. Said fraudulent concealment was perpetrated by Watson W. Wise upon the Plaintiff throughout the said divorce and said defendant falsely swore to a "complete" inventory of all property in his name whether of a community nature or claimed

as separate property. The inventory is further described in paragraph 5 of this complaint, and said inventory failed to include any of the mineral rights or other interests sued for in this cause. After filing the said inventory and at all relevant times thereafter, said Watson W. Wise knowingly concealed and willfully failed to disclose to the Plaintiff the interests sued for in this cause although he knew or had reason to know: (a) that Plaintiff had a valid interest now disclosed or divided in the Texas divorce; and (b) that same should have been divided therein.

20. That Defendant, Watson W. Wise, willfully concealed and failed to disclose to the Plaintiff the said interests sued for in this cause at the time Plaintiff and Watson W. Wise were engaged in their divorce action and at the time the final decree of divorce was entered, when said Defendant, Watson W. Wise, knew or should have known that the disclosure of such interests would have caused the Plaintiff to be accorded her fair rights in such interests.

21. That Defendant, Watson W. Wise, continued willfully and fraudulently to conceal the interests sued for in this cause from the Plaintiff after their divorce and even after Phillips Petroleum Company began negotiating with Watson W. Wise to lease a portion of said interests from him. At no time did the Defendant Wise apprise the Plaintiff of the existence of the aforesaid interests or of the



fact that Phillips sought to lease a portion thereof although Defendant Wise well knew that his sworn "complete" inventory filed pursuant to court order in the Texas divorce had not included the interest Phillips sought to lease nor had it included the other interests sued for herein. In fact, the Defendant Wise on December 8, 1970, attempted to lease an entire interest in his name to Phillips without in any way advising the Plaintiff of the facts aforesaid.

22. That at all relevant times before, during and after the negotiation and execution of the lease of December 8, 1970, between the Defendant, Watson W. Wise, and the Defendant, Phillips Petroleum Company, the latter Defendant had actual and legal knowledge of the rights or potential rights of the Plaintiff in the said interests leased, and further Phillips Petroleum Company knew that Watson W. Wise had not revealed these Florida assets to the Plaintiff in the divorce proceeding or at any time thereafter. In spite of its knowledge and ability to inquire of the Plaintiff, Phillips Petroleum Company made no inquiry of the Plaintiff as to her actual or potential interests and, in fact, participated in the concealment of these assets from the Plaintiff so as to further its own interests by acquiring a lease from Watson W. Wise. Specifically, Phillips Petroleum Company was aware that the sworn inventory filed by the Defendant, Watson W. Wise, in the aforesaid divorce proceeding failed to disclose the Florida

interests sued for herein although such inventory was filed pursuant to order of court and although such inventory was required to list all properties whether thought to be owned by the community or separately by the Defendant, Watson W. Wise.

23. Because of the acts of the Defendant, Watson W. Wise, aforesaid, and particularly those alleged which occurred in the years 1964, 1965 and 1970, a constructive trust in favor of the Plaintiff arose and was imposed upon the properties sued for herein.

24. The Defendant, Phillips Petroleum Company, prior to December 8, 1970, became aware of the facts of concealment and fraud alleged above perpetrated by the Defendant Watson W. Wise, and thereafter participated in said concealment and fraud to further its interests and to the detriment of the Plaintiff, so that the Plaintiff's rights are superior to any rights of Phillips Petroleum Company in the mineral rights leased to Phillips by Watson W. Wise.

25. The Plaintiff had no knowledge that the assets involved in this suit were in the name of the Defendant, Watson W. Wise, at the time of and during the pendency of her divorce from Watson W. Wise, and thereafter until 1972 when she became aware of said interests and promptly sought to enforce her claim thereto.

WHEREFORE, the Plaintiff prays for a judgment and decree of this Court imposing



a constructive trust upon all the interests sued for in this cause and cancelling, declaring void and/or reforming the aforesaid lease of Phillips Petroleum Company of December 8, 1970, so as to render said lease void and inoperative as to the rightful interest of the Plaintiff in the property covered by said lease; and further Plaintiff prays for an order requiring appropriate conveyances from the Defendants to the Plaintiff of her said interests, or that such conveyances be made by order of this Court; and further Plaintiff prays for damages against said Defendants for all such monies as may be due her from the Defendants under the allegations of this count including interest and costs.

ANSWER TO NEW AFFIRMATIVE DEFENSES OF PHILLIPS PETROLEUM COMPANY

The Plaintiff answers the substituted affirmative defenses of Phillips Petroleum Company numbers 3 and 4 as follows:

Affirmative defense number 3 is denied.

Affirmative defense number 4 is denied.

The Plaintiff prays that said affirmative defenses be dismissed.

s/ Wilmer H. Mitchell
MITCHELL & OBERHAUSEN, P.A.
130 East Government Street
Pensacola, Florida 32501

(Served December 4, 1975)

IN THE CIRCUIT COURT OF
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

RESUBMISSION OF REQUEST FOR ADMISSIONS TO WATSON W. WISE

The Plaintiff resubmits Request for Admissions 3, 4, 5, 6, 7, 8, and 9 previously submitted August 1, 1974, apparently without attached exhibits, and requires the Defendant, Watson W. Wise to admit the truth of the following within thirty (30) days after the service of this resubmission:

3, That the attached Exhibit "A" is a true and complete copy of the sworn inventory and appraisal made by you and filed in the above described divorce action August 6, 1964, pursuant to an order of the Court of Domestic Relations of Smith County, Texas dated July 6, 1964.

4. That a true and complete copy of the said order of July 6, 1964, is attached hereto as Exhibit "B".

5. That your said inventory and appraisal listed none of the assets sued for in the case at bar, although you had title to such interests at the time you swore to the completeness of the inventory.

6. That you agreed to and executed the agreement dated May 18, 1965, referred to in paragraph 6 of the Complaint and



attached hereto as Exhibit "C". [Exhibit "C" is omitted since it is shown as Exhibit "A" to the Complaint.]

7. That during negotiation for and at the time of execution of the said agreement, Exhibit "C", you were represented by counsel.

8. That the settlement agreement between you and your former wife, Exhibit "C", has never been altered, amended, cancelled or rescinded.

9. That you and the Plaintiff were divorced by a judgment entered in the above described divorce case May 25, 1965, and that a true and correct copy of the said final judgment of divorce is attached hereto as Exhibit "D".

(Served December 23, 1974)

s/ Wilmer H. Mitchell
HOLSBERRY, EMMANUEL,
SHEPPARD, MITCHELL &
CONDON
34 West Government Street
Pensacola, Florida 32506
ATTORNEYS FOR PLAINTIFF

AFFIDAVIT

THE STATE OF TEXAS )

COUNTY OF SMITH )

BEFORE ME, the undersigned authority in and for said County and State, on this

day personally appeared WATSON W. WISE, who being by me duly sworn on his oath says:

That affiant is the Defendant in Cause No. 64-480, Louise Orr Wise vs. Watson W. Wise, in the Court of Domestic Relations of Smith County, Texas.

That, insofar as Defendant knows and believes, the hereto attachment and papers contained within this file is a complete inventory and partial appraisement of all property in his possession or under his control, a part of which property is owned by the Plaintiff and the Defendant as their community property and the remaining part of such property is owned by the Defendant and his sister as their separate property, and that in instances in which values are placed on certain of the properties, such values are correct in the good faith opinion of the Defendant.

s/ Watson W. Wise

SWORN TO AND SUBSCRIBED before me, the undersigned authority, by the said WATSON W. WISE, on this the 6th day of August, 1964, to certify which witness my hand and seal of office.

s/ Vera Birdwell

FILED
Exhibit "A"



August 6, 1974
Philip L. Dibert, Clerk
Court of Domestic Relations
Smith Co., Tex.

* * *

(The lengthy inventory attached to this affidavit is omitted. It did not include any of the Florida interests which are the subject of the instant suit.]

Exhibit "A"

---

IN THE COURT OF DOMESTIC RELATIONS
SMITH COUNTY, TEXAS

| | | |
|---|---|---|
| LOUISE ORR WISE | ) | FILED July 6, 1964 |
| | ) | Philip L. Dibert |
| VS. | ) | Clerk, Court of |
| | ) | Domestic Relations, |
| WATSON W. WISE | ) | Smith Co., Tex. |

No. 64-480

TEMPORARY RESTRAINING ORDER

On this the 6th day of July, A. D., 1964, came on to be heard the application and Petition of Plaintiff, LOUISE ORR WISE for: (1) an inventory and appraisement of the community and other property of the parties in the hands or under the control of Defendant, WATSON W. WISE: (2) temporary alimony during the pendency of this cause;

Exhibit "B"

and (3) for an injunction and restraining order against the said Defendant, enjoining and restraining Defendant from certain acts; and it appearing to the Court from the facts stated in Plaintiff's verified Petition that the following temporary restraining order respecting the property and records and parties hereto is necessary and equitable and that the Plaintiff is entitled to a temporary restraining order and that immediate and irrevocable and irreparable injuries, loss, or damage will result to the Plaintiff before notice can be served and hearing had hereon by reason of the fact that it is made to appear by the pleadings by the Plaintiff filed herein that the community property and records of the parties is in danger of being secreted, destroyed, or removed beyond the jurisdiction of this Court, or beyond the reach of Plaintiff, by Defendant:

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED by the Court that the clerk of this court issue a temporary restraining order operative immediately until and pending the hearing below ordered, restraining Defendant, WATSON W. WISE, from (1) interfering in any manner with Plaintiff's exclusive possession and use of the home at 2001 S. Chilton Street, Tyler, Texas; and (2) from secreting, removing or destroying any of the following: Any bank statement, checks or deposit slips originating during the marriage now in his possession or under his control; any copies





of income tax returns (State or Federal); work sheets or other instruments supporting same originating since the marriage, whether in his possession or the possession of his accountant, agent or other employee; any stocks, bonds or other securities in the possession of Defendant, or under his control or claimed by him; any cash, notes or other evidence of indebtedness owned or claimed by him; and the Court being of the opinion that it is necessary for the preservation of Plaintiff's rights that Defendant be required to make an inventory and appraisement of said community and other property mentioned in Plaintiff's verified petition; and it further appearing to the Court that unless the temporary restraining order set forth hereinabove be granted and issued, Defendant would probably do irrevocable injury and damage to the interests of Plaintiff in such property and records of Plaintiff and Defendant, and will probably secrete, destroy, or remove same from the jurisdiction of this Court or beyond the reach of Plaintiff;

IT IS THEREFORE, THE FURTHER ORDER OF THIS COURT that the Clerk of this Court issue an order commanding said Defendant to appear before the judge of this Court sitting in the Courtroom of and for the Court of Domestic Relations in the County Courthouse of Smith County, in Tyler, Texas on the 13th day of July, 1964 at 2:00 o'clock P.M., to show cause, if any he has, why the injunction in the

terms of said temporary restraining order shall not be granted upon such petition, effective until final decree herein and further, ordering Defendant to obey the temporary restraining order herein granted until the further order of this Court.

IT IS THE FURTHER ORDER of this Court that the above mentioned show cause order shall quote this FIAT and shall be accompanied by a true and correct and certified copy of the above and foregoing Plaintiff's Original Petition.

It appearing to the Court that this is a divorce proceeding and suit and as authorized by law, no bond shall be required of the Plaintiff, and Defendant shall be bound hereby from the moment of actual notice to him, whether served with process or not.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the said Defendant, WATSON W. WISE, shall file with the Clerk of this Court, in this cause within 30 days from the date this Order is served upon him, a complete inventory and appraisement, under oath, of all property in his possession or under his control, wherever located, and claimed by defendant, whether he considers same as part of the community estate, or otherwise, and that the value placed on same be according to Defendant's good faith opinion.

IT IS FURTHER ORDERED that the Application of Plaintiff for temporary alimony during the pendency of this suit

Exhibit "B"



as contained in her said verified petition, be heard by and before this Court at the same time and place hereinabove fixed for hearing her Application for temporary injunction hereinabove set out.

Done this the 6th day of July, A.D., 1964, at 3:35 o'clock P.M. in Tyler, Smith County, Texas.

s/ Craven Beard
Judge

Exhibit "B"

---

IN THE CIRCUIT COURT OF
SANTA ROSA COUNTY, FLORIDA

* * *
[Case style omitted]

ANSWER TO RESUBMISSION OF
REQUEST FOR ADMISSIONS

Defendant Watson W. Wise answers plaintiff's resubmission of request for admissions as follows:

(3) Defendant admits that he executed the instrument shown in the request as Exhibit "A"; defendant is unable to say whether or not said Exhibit "A" is complete or contains all of the property contained in the document filed on August 6, 1964 and further states that said affidavit and the property listed therein was not compiled by this defendant.

(4) Defendant admits that Exhibit "B" appears to be a true and correct copy of the order of July 6, 1964.

(5) Defendant admits that a portion of the interest here in question was titled in his name in July of 1964, a further portion was titled in his name as trustee and all of said property was held for the benefit of the plaintiff and his sister, and, to the extent that he had ownership thereof, it was his individual, separate property.

(6) Defendant admits the execution of Exhibit "C" but denies the remaining portion of said request.

(7) Admitted.

(8) Defendant is without knowledge as to the allegations of this paragraph and therefore can neither admit nor deny.

(9) Admitted.

(Served January 23, 1975)

s/ W. Spencer Mitchem

---

IN THE CIRCUIT COURT OF
SANTA ROSA COUNTY, FLORIDA

* * *
[Case style omitted]

MOTION FOR SUMMARY JUDGMENT

Comes now defendant, Watson W. Wise,



and moves the Court to enter a summary judgment in his favor in this matter on the grounds that the pleadings, depositions, interrogatories and exhibits admitted in this cause show that there is no issue of material fact and that said defendant is entitled to summary judgment as a matter of law.

(Served October 14, 1975)

s/ W. Spencer Mitchem

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IN THE CIRCUIT COURT FOR
SANTA ROSA COUNTY, FLORIDA

* * *
[Case style omitted]

DEFENDANT PHILLIPS PETROLEUM COMPANY'S
MOTION FOR SUMMARY JUDGMENT

Defendant, PHILLIPS PETROLEUM COMPANY, moves for entry of a summary judgment in its favor and against the plaintiff, LOUISE ORR ESTABROOK, on the grounds that the pleadings, depositions, answers to interrogatories and admissions on file, together with such affidavits as may have been heretofore filed, show that there is no genuine issue as to any material fact and that this defendant is entitled to a judgment as a matter of law.

CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, PA
P. O. Box 3239
Tampa, Florida 33601

Attorneys for Phillips
Petroleum Co.

s/ William F. McGowan, Jr.

(Served October 28, 1975)

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IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, FLORIDA
Case No. 74-C-53

LOUISE ORR ESTABROOK,

Plaintiff,

Vs.

WATSON W. WISE and PHILLIPS PETROLEUM COMPANY, a corporation,

Defendants.

---

Filed & Recorded in
Orders & Judgments
Book 72, page 268

FINAL SUMMARY JUDGMENT

This cause is before the Court upon the motion of the Defendant Watson W. Wise and the Defendant Phillips Petroleum Company for entry in their favor of a final summary judgment. The Court has carefully reviewed the file, the depositions, and the briefs in this cause. It is the opinion of the Court that there exists no genuine issue of fact



and that the Defendants, as a matter of law, are entitled to judgment. Therefore, it is

ORDERED, CONSIDERED, and ADJUDGED that the Plaintiff Louise Orr Estabrook take nothing by her said suit, that final summary judgment be and the same is hereby entered in favor of the Defendants, Watson W. Wise and Phillips Petroleum Company and against the Plaintiff Louise Orr Estabrook, and that said Defendants shall go hence without day.

The Court reserves jurisdiction for the sole purpose of assessing the Defendants' costs of Court upon motion.

Conformed copies furnished to Wilmer H. Mitchell, Esquire, W. Spencer Mitchem, Esquire, and William F. McGowan, Jr., Esquire.

DONE and ORDERED in Chambers at Milton, Florida, this 19th day of December, 1975.

s/ Woodrow M. Melvin
Circuit Judge

---

IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

MOTION FOR RE-HEARING

The Plaintiff moves for re-hearing on

the Summary Final Judgment entered December 19, 1975, pursuant to Rule 1.530 of the Florida Rules of Civil Procedure.

As grounds for the motion the Plaintiff shows that the Court's finding that there is no dispute of material facts is in error because the record demonstrates there are disputes of facts on every material issue, and such facts as are undisputed favor the Plaintiff; the Court's determination that the Defendants are entitled to judgment as a matter of law is in error in that there is no basis upon which the Defendants should have judgment as a matter of law; the original exhibit P-X-1 to the deposition of Louise Orr Estabrook (page 58) was inadvertently not attached to the deposition on file with the Court, and this exhibit is of substantial import in that it shows the context in which the Defendant Wise acquired the properties in suit; the Court has not heard oral argument since the filing of the briefs and memoranda of the parties, and the case is of such importance and the number and complexity of legal issues are such that oral argument should be permitted subsequent to the said filing.

Further, the Court in its judgment made no findings and did not specify upon which of the numerous defenses its judgment was based. In the interest of judicial time the judgment should be re-opened to clarify the grounds of the decision.

[Notice of Hearing omitted since this Motion was denied without hearing]



s/ Wilmer H. Mitchell
MITCHELL & OBERHAUSEN, P.A.
130 East Government Street
Pensacola, Florida 32501
Attorneys for Plaintiff

(Served on December 23, 1975)

---

IN THE CIRCUIT COURT IN AND FOR SANTA ROSA COUNTY, FLORIDA

| | | |
|---|---|---|
| LOUISE ORR ESTABROOK, Plaintiff, | ) | |
| Vs. | ) | Case No. 74-C-53 |
| WATSON W. WISE and PHILLIPS PETROLEUM COMPANY, a corporation, Defendants. | ) | |

O R D E R

This cause is before the Court upon motion of the Plaintiff for rehearing addressed to the Order of this Court granting summary judgment. Upon examination of such petition, it appears to the Court that oral argument thereon would not be helpful. Therefore, it is

ORDERED, CONSIDERED, and ADJUDGED that Plaintiff's motion for rehearing be and the

same is hereby denied.

Conformed copies furnished to Wilmer H. Mitchell, Esquire, John E. Venn, Jr., Esquire, and W. Spencer Mitchem, Esquire.

DONE and ORDERED in Chambers at Milton, Florida, this 31st day of December, 1975.

s/ Woodrow M. Melvin

---

[On Appeal to the First District Court of Appeal of Florida]

IN THE CIRCUIT COURT IN AND FOR SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

ASSIGNMENTS OF ERROR

The Plaintiff/Appellant, Louise Orr Estabrook, assigns as error the entry of the Summary Final Judgment in favor of the Defendants of December 19, 1975, and the entry of the Order denying the Plaintiff's motion for rehearing entered December 31, 1975, which Judgment and Order denied Plaintiff's motion for partial summary judgment.

s/ Wilmer H. Mitchell
MITCHELL & OBERHAUSEN, P.A.
130 East Government Street
Pensacola, Florida 32501
Attorneys for Plaintiff

(Served January 9, 1976)

---



IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1977

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

| | | |
|---|---|---|
| LOUISE ORR ESTABROOK, Appellant, | ) | |
| vs. | ) | Case No. AA-444 |
| WATSON W. WISE and PHILLIPS PETROLEUM COMPANY, a corporation, Appellees. | ) | |

---

Opinion filed July 11, 1977.

An Appeal from the Circuit Court for Santa Rosa County. Woodrow M. Melvin, Judge.

Wilmer H. Mitchell of Mitchell & Oberhausen for Appellant.

William F. McGowan, Jr., of Carlton, Fields, Ward, Emmanuel, Smith & Cutler; and W. Spencer Mitchem of Beggs & Lane for Appellees.

RAWLS, Acting Chief Judge.

Discovery of oil in the Jay, Florida, oil field area has resulted in a microscopic scrutiny of the title to land in that vicinity. So, we are here confronted

with an appeal from a final summary judgment in which the trial court found that appellant-plaintiff Estabrook had no claim of interest which she asserted in certain Florida property.

By her complaint, Mrs. Estabrook alleged that she and appellee-defendant Warren Wise were residents of Tyler, Texas, and the purpose of her suit was to impose a resulting trust in favor of herself in mineral rights in certain Florida real property which was presently in the name of Wise; a portion of which had been leased to defendant-appellee Phillips Petroleum Company. Further allegations were that she and Wise were married in Texas (a community property state) in 1930 and remained married in that state until 1964, when she filed her petition for divorce. The gist of her further allegations are that during her marriage, Wise acquired the claimed interest in Florida minerals with community property funds, and that during their divorce litigation in Texas, he willfully failed to disclose his interest in same to the Texas court. Wise, by his answer, asserted the following affirmative defenses: 1) Mrs. Estabrook had knowledge of the ownership of the separate property in Florida, and, therefore, her action was barred by the statute of limitations; 2) laches; 3) the action is barred because the subject property was not purchased with community funds; 4) Mrs. Estabrook's claim is founded upon a community property agreement entered into in Texas and upon the community property law of Texas which has



no effect upon real property located in Florida; and 5) this action is barred because of the entry of the final decree of divorce between Mrs. Estabrook and Wise.

The trial court did not recite any specific ground in its final summary judgment upon which to enter same. Our review of this extensive record discloses several valid grounds upon which to sustain same; however, we will confine our comments to the latter ground based upon the Texas divorce.

On May 18, 1965, Mrs. Estabrook (at that time Mrs. Wise) and Mr. Wise entered into a property settlement agreement which stated, in part:

> "...[A]nd no issue regarding community property... is to be submitted to the Court... if it should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto."

The final judgment of divorce was entered by the Texas court on May 25, 1965, incorporating the terms of the property settlement between the parties. In 1972, Mrs. Estabrook filed suit in Texas claiming an interest in the Florida property, which suit was ultimately dismissed by agreement of tne parties.

The Texas divorce decree was a final

judgment of divorce incorporating a property settlement agreement between the parties. Florida is not a community property state, and thus is not required to recognize an encumbrance predicated upon a foreign state's community property law. The establishment of non-record title interests arising out of marital claims should be settled in the forum state. Finston v. Finston, 27 So.2d 423 (Fla. 1948) Dotter v. Dotter, 147 S9.2d 209 (Fla. 2nd DCA 1962); Jones v. Jones, 140 So.2d 318 (Fla. 1st DCA 1963). The Texas court had jurisdiction pursuant to the agreement of the parties which was incorporated in its 1965 divorce decree for the parties to further "pursue his or her rights and remedies thereto." Mrs. Estabrook did pursue her alleged rights in the Texas court; however, she also sought a construction of that court's decree in the Florida court and subsequently abandoned her forum state. Any initial relief, pursuant to the final decree entered by the Texas court, should have first been resolved by that jurisdiction.

As stated in Cooper v. Cooper, 69 So. 2d 881 (Fla. 1954):

> "As already pointed out the inquiry seems to have gone afield by developing how the parties to the original marriage had accumulated property and lost or gained in its manipulation, evidently on the theory that there should be a judicial determination of the fairness of the division when the personalty was exchanged for realty. This was a futile procedure because the divorce



case then pending had, meanwhile culminated in a final decree and property rights then and there became settled. Finston v. Finston, 160 Fla. 135, 37 So.2d 423. We announced there the rule 'that a final decree * * * settles all property rights of the parties and bars any action thereafter brought by either party to determine the question of property rights.' In that case the court had before it the question of property rights and held that the doctrine of res judicata controlled. Here the property rights were not introduced in the litigation but they could and should have been so the same rule applies here as will be seen by an examination of our opinion in Town of Boca Raton v. Moore, 122 Fla. 350, 165 So. 279, cited as authority for the rule stated in Finston v. Finston, supra."

We hold that the doctrine of res adjudicata controls. The judgment appealed is

AFFIRMED.

SMITH and ERVIN, JJ., CONCUR

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

* * *

[Case style omitted]

PETITION FOR REHEARING

The Appellant files its Petition for Rehearing directed to the opinion of this Court filed July 11, 1977, and shows as follows:

1. In concluding its opinion this Court states, "We hold that the doctrine of res adjudicata controls." Apparently the Court thus ruled that the Plaintiff/ Appellant here was barred from bringing an action against her former husband because of their Texas divorce in 1965.

Such a holding by this Court is erroneous in that it attempts to accord the Texas divorce decree more weight than it would be given in the State of Texas.

There is not any dispute that if the Appellant and the Appellee, Wise, litigated all their property rights, including the Florida rights involved in this suit, in the Texas divorce proceedings, and if that decree finally determined those matters, the instant case would be barred. However, Texas law provides that the parties to a divorce proceeding may litigate their rights to community and other properties subsequent to their divorce. In fact any property not disposed of in the divorce proceeding is presumed to be community property absent a clear and convincing showing to the contrary. Where a divorce has been granted without an adjudication of the property rights of the parties, the wife may subsequently maintain an action



to sue for the protection of her community property interest. Furthermore, the wife cannot be presumed to have full knowledge of all of the property to which she may have a claim, and an inventory by commissioners appointed in the suit for divorce is not conclusive on the wife. (See 20 Tex. Jur. 2d "Divorce and Separation" Section 265, copy attached.)

A Texas decree of divorce does not purport to make a partition of the community property between the husband and wife unless such partition is particularly set forth therein. Furthermore, any overlooked property interests are subject to review absent a "residuary clause" in the decree of the court. A Texas divorce decree does not preclude a subsequent suit by either party for such partition. (See Texas Family Law "Divorce, Suits and Separation" Section 5:72 and Section 5:138, copies attached.)

Texas cases recognize that it is perfectly proper for a Texas divorce court to withhold disposition of some or all property rights in a divorce action, and the parties thereafter have a right to litigate questions of community property in later proceedings dealing with property not so divided. See Blakely v. Herring, 374 SW 2d 677 (CCA Tex. 1964), recognizing that a party to a divorce in which his right to certain property is not partitioned may have the property adjudicated in a subsequent proceeding. Busby v. Busby, 457 SW 2d 551 (Tex. 1970) is a case in which the

Supreme Court of Texas specifically found that where community property rights were not partitioned at the time of a divorce proceeding, the judgment entered in a divorce suit did not preclude the former wife seeking partition of the undivided community property in a subsequent suit. See also Thompson v. Thompson, 500 SW 2d 203 (CCA Tex. 1973).

In the Texas divorce between Mr. Wise and Mrs. Estabrook the Final Judgment entered by the Texas court specifically provided (pursuant to an agreement and clear understanding of the parties):

> "that all issues as to the existence or disposition of community property rights, or other property rights, have, by amended pleadings filed herein been withdrawn and eliminated from this cause."

The reason the judgment recognized that the court did not deal with the property of the parties was because of an agreement between the Appellant and her former husband, dated May 18, 1965 which provided:

> "...and no issue regarding community property or accounting of community funds is to be submitted to the Court and all such issues are to be withdrawn from the pleadings. The Judgment to be entered shall state that the Court is making no adjudication of property rights between the parties. In this connection, if it



> should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto." (emphasis added)

Thus, it is seen that the Texas divorce decree did not litigate the property rights of these parties and they specifically withdrew those rights from the Court and preserved to themselves the rights to pursue any other remedies with reference to property not divided. Under the law of Texas and the authorities cited above, the parties would have that right and no subsequent action would be barred by res adjudicata. There was no decision by the Texas court which would bar the Appellant from suing in Texas, and this Court is in error if it attempts to give the Texas decree greater effect in Florida than it would have in Texas. Accordingly, the Texas decree is not res adjudicata as stated by this Court in its opinion of July 11, 1977.

* * *

[Irrelevant portions omitted]

3. Since this case was briefed and argued the Second District has decided the case of Strickland v. Strickland, 344 So.2d 931 (2 DCA Fla. 1977) in apparent conflict with the present decision of this court. In the Strickland case the ex-wife brought an action for partition of Hendry County property asserting an undivided one-half interest therein. The defendant responded with a counterclaim pleading a

prior Florida support proceeding and a 1973 Georgia divorce decree. He claimed that the issues raised were thus barred by res adjudicata.

The Second District disagreed because the Georgia decree specifically indicated that it was not making a determination as to the real estate and there was no adjudication as to property rights of the parties in the subsequent Florida support case. The Second District recognized the doctrine of res adjudicata as appropriate to the judgment of a sister state and that such judgments were entitled to full faith and credit. (emphasis added)

* * *

For the above reasons the Petition for Rehearing should be granted and the Summary Judgment reversed.

Respectfully submitted,

s/ Wilmer H. Mitchell
MITCHELL & OBERHAUSEN, P.A.
130 East Government Street
Pensacola, Florida 32501
Attorney for Appellant

(Served July 25, 1977)

---



IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1977

| | | |
|---|---|---|
| LOUISE ORR ESTABROOK, Appellant, | ) | |
| vs. | ) | Case No. AA-444 |
| WATSON W. WISE and PHILLIPS PETROLEUM COMPANY, a corporation, Appellees. | ) | |

O R D E R

Petition for Rehearing and Response thereto having been considered,

IT IS ORDERED that the petition is hereby denied.

By Order of the Court dated this 8th day of August, A. D. 1977. Acting Chief Judge John S. Rawls, Judge Robert P. Smith, Jr., Judge Richard W. Ervin, III.

A True Copy

ATTEST:

RAYMOND E. RHODES, CLERK

s/ Raymond E. Rhodes
District Court of Appeal, First District
Tallahassee, Florida

IN THE SUPREME COURT OF FLORIDA

LOUISE ORR ESTABROOK,

Petitioner,

v.

WATSON W. WISE and PHILLIPS PETROLEUM COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL - FIRST DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner, Louise Orr Estabrook, presents this her petition for a writ of certiorari and states:

1. Petitioner seeks to have reviewed a decision of the District Court of Appeal, First District, filed July 11, 1977, Petitioner's Petition for Rehearing having been denied August 8, 1977.

2. This petition is presented under and pursuant to Article 5, Section 3(b)(3) of the Constitution of Florida, and Florida Appellate Rule 4.5c.(6).

* * *

A. (1) The First District's opinion conflicts with Strickland v. Strickland,



344 So.2d 931 (2 DCA Fla. 1977). In the Strickland case the ex-wife brought an action for partition of Hendry County property asserting an undivided one-half interest therein. The defendant responded with a plea that a prior Florida support proceeding and a 1973 Georgia divorce decree barred the suit by res judicata.

The Second District disagreed because the Georgia decree specifically indicated that it was not making a determination as to the real estate and there was no adjudication as to property rights of the parties in the subsequent Florida support case. The Second District recognized the doctrine of res adjudicata as appropriate to the judgment of a sister state and that such judgments were entitled to full faith and credit. The court then correctly pointed out the key to whether the foreign decree will be applied as a bar stating: (emphasis added)

> "However, this is confined to those issues, the subject matter and parties properly before the court in the prior proceeding. See Matthews v. Matthews, 133 So.2d 91 (Fla. 2d DCA 1961). Neither the Florida real property involved in these proceedings, the status of its title, the rights or claims of the parties with respect thereto, nor the facts and circumstances bearing on such were involved or determined in the Georgia proceedings."

* * *

C. The express terms of the foreign divorce decree and the separation agreement of the parties preclude the prior suit from being res judicata.

(1) The decision on review had to be premised on conclusions that neither the Texas decree nor the separation agreement is valid and enforceable. The First District's holding directly conflicts with the decision of the Florida Supreme Court in Aldrich v. Aldrich, 163 So.2d 176 (Fla. 1964) holding (1) that a final and unappealed decree of an equity court, even if not authorized by statute and beyond the court's inherent power, nevertheless is valid on its face and enforceable against a party to that proceeding; and (2) a party to a separation agreement is bound by its terms even if it contains provisions which an equity court could not order if the issue were litigated.

(2) The Texas divorce decree specifically noted that no issues of property rights were submitted to the Court. That decree is presumed valid on its face and the trial court is not at liberty to ignore the binding order of that foreign court. Thus this decision conflicts with this court's decision in Newton v. Newton, 245 So.2d 45 (Fla. 1971), which recognized that divorce decrees of sister states are entitled to full faith and credit under the United States Constitution §1, Article IV. (emphasis added)

(3) The decision under review also conflicts with Donner v. Donner 302 So. 2d 452 (3 DCA Fla. 1974) a case involving an agreement to make a will set forth in



a written separation agreement entered in the State of New York March 2, 1959, which was incorporated in an April 1959 Alabama divorce decree. The husband neglected to make his will in accordance with the agreement and his ex-wife sued his estate in Florida.

Although the agreement did not comply with the Florida statute regulating contracts to make a will, the Florida court enforced the separation agreement and held that it is entitled to full faith and credit in Florida, stating: (emphasis added)

> "Where a court of competent jurid-diction enters a valid divorce decree and therein specifically approves a separation agreement and incorporates it in the decree, the agreement may be said to be valid and enforceable, and collateral attack upon it will not be allowed, even if the agree-is not merged into the decree." (citing cases) "This is also true when the decree is rendered by a sister state and full faith and credit applies." (emphasis added) (302 So.2d at 457)

* * *

s/ Wilmer H. Mitchell

s/ Lawrence W. Oberhausen

(Filed September 6, 1977)

SUPREME COURT OF FLORIDA

Wednesday, November 30, 1977

| | | |
|---|---|---|
| LOUISE ORR ESTABROOK, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | Case No. 52,380 |
| vs. | ) | |
| | ) | DISTRICT COURT |
| WATSON W. WISE and | ) | OF APPEAL |
| PHILLIPS PETROLEUM | ) | |
| COMPANY, | ) | FIRST DISTRICT |
| | ) | |
| Respondents. | ) | AA-444 |

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C.J., SUNDBERG, HATCHETT, KARL, JJ. and DREW, RET. J., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

s/ D. Causseaux



"Extracts from Appellant Brief to District Court of Appeal of Florida, First District"

* * *

On May 18, 1965, the Plaintiff and Watson W. Wise entered into an agreement which was recorded in Official Records Book at page 538 of the Official Records of the Court of Domestic Relations of Smith County, Texas. Said agreement provided,

> "... and no issue regarding community property or accounting of community funds is to be submitted to the Court and all such issues are to be withdrawn from the pleadings. The judgment to be entered shall state that the Court is making no adjudication of property rights between the parties. In this connection, if it should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto. Louise Orr Wise, Plaintiff, and Watson W. Wise, Defendant, the parties hereto now assert that they have no actual knowledge at this time of any community property existing to said marriage which now remains undivided." (emphasis added) [R259, A11]

The attorneys for the parties affirmed the same knowledge [R259; A11]

On May 25, 1965, the final judgment of divorce was entered and said judgment incorporated the terms of the agreement using this language,

> "The Court finds that all issues as to the existence or disposition of community property rights or other property rights, have, by the amended pleadings filed herein, been withdrawn and eliminated from this cause; and the Court is not called upon to adjudicate any property right issues or any property or money accounting issues between said parties as no such issues remain in this cause." [R262; A23]

* * *

Defendants asserted at trial that the Texas community property law cannot be applied by this Court so as to affect the interests of parties in Florida real estate which is the subject of this litigation. This, however, is not the case.

Florida courts have recognized that the interest of one spouse in property acquired by the other during arriage is determined by the law of the domicile of the parties when the property was acquired. In Quintana v. Ordono, 195 So. 2d 577 (3 DCA Fla. 1967), cert. discharged 202 So.2d 178 (Fla. 1967), the Third District considered this exact question which arose with regard to Florida assets which were acquired by one spouse while married and domiciled in Cuba, a community property country. The Florida



Court stated:

> "Under Florida law, if a portion of the consideration belongs to the wife and title is taken in the husband's name alone, a resulting trust arises in her favor by implication of law to the extent that consideration furnished by her is used. A resulting trust is generally found to exist in transaction affecting community property in non-community property states where a husband buys property in his own name..." (at 580)

The Quintana case involved personalty rather than realty but the principles are the same. In Quintana, the Florida court cited with favor a Mississippi case which did involve realty, Stone v. Sample, 216 Miss. 287, 62 So.2d 307, 63 So.2d 555 (Miss. 1953), a case in which the material facts are virtually identical to those in this case.

In Stone v. Sample, the husband purcahsed certain mineral rights in the State of Mississippi (a non-community property state) while he was a married man and a resident citizen of the State of Texas. The conveyances were made to the husband alone. The Mississippi taxing authorities attempted to impose a tax upon the husband as the sole owner of the property, and the husband and wife resisted, asserting that they were joint owners in accordance with the community property law of Texas which governed their interests in the Mississippi real estate. In ruling that the property was, in fact, subject to a

resulting trust in the wife, the Mississippi Court, facing the exact issue which is before this Court, stated:

> "The Commission invokes the rule that real property is controlled by the law of its situs. That, of course, is true. This is not an effort to transport the Texas community law into this state. The title of Mrs. Sample to a half interest in the property in Mississippi does not result from application of the community law of Texas to the real property in Mississippi. The trusteeship comes about as a result of using her money in the purchase of the property regardless, as above stated, how or where she acquired title to the money. The same result would have come about had she acquired such title in a noncommunity property state. There is no prohibition against a nonresident of Mississippi asserting a resulting trust in lands in this state." (at 309)

In other words, the Mississippi court reasoned that the wife's interest under the community property law of Texas arose in the assets which were used to purchase the land in Mississippi. The law of Texas controlled the wife's interest in those funds and, therefore, the Mississippi Court recognized her interest in Mississippi real estate which was purchased with those joint assets. The Mississippi court's analysis



is exactly applicable to the facts in this case. Florida has relied upon that analysis and adopted it in Quintana v. Ordono, supra, expressly recognizing to that extent the impact of foreign community property law on Florida property.

The important thing is not the nature of the asset, but whose funds were used to make the purchase. If a wife's funds from any state are used to purchase Florida assets of any kind, a resulting trust arises which is enforceable in equity. The fact that her ownership of the funds was a result of the community property law of her domicile is of no consequence. Important exceptions are appropriate to protect bona fide purchasers or third parties entitled to rely on record title to real property, but no innocent third party is involved in this case.

This is in accord with the recognized rule stated in Principles of Community Property, supra, at page 224:

> "§92 -- Property removed to or acquired in state other than domicile.
>
> Where the spouses without changing their domicile send or remove property to another state, it is recognized in the latter state that it retains the same nature it had when sent or removed from the domicile of the spouses. Thus, property which is separate property in the noncommunity property domicile of the spouses is recognized as separate property if sent or removed to a

community property state, and conversely community property of the spouses in a community property domicile of spouses remains the property of both although removed to a community property state and although the title appears in the name of one of the spouses only. Even if the form of the property is changed after its removal, by conversion to some other type of property, the nature of the ownership rights is not affected thereby..." (emphasis supplied)

* * *

The Defendants denied that the property was acquired with community funds and filed a variety of affirmative defenses which will be reviewed in detail at the conclusion. Reviewing the defenses: #1 Mr. Wise alleged that the Plaintiff had knowledge of these interests and was barred by the statute of limitations [R19, A19]; #2 Plaintiff is barred by laches and rights accruing to an innocent purchaser [R19, A19]; #4 purchase was not made with community assets [R20, A20] (Phillips also asserts this defense as its #7); #5 the claim is barred because it is based upon the community property law of Texas which has no effect in Florida [R20, A20] (Phillips also asserts this defense as its #6); #6 Plaintiff is barred by the 1965 Texas divorce [R29, A21]; #7 Plaintiff is limited to the amount of her recovery to one-half the value of the property at the time of purchase or divorce [R95, A21].



Note that Mr. Wise withdrew his affirmative defense #3 and Phillips withdrew its defenses #1, #2 and #5.

Phillips affirmative defenses #3 and #4 originally alleged that Phillips was an innocent purchaser protected by laches and estoppel, respectively [R16, A16]. Significantly, Phillips withdrew these defenses conceding that it was not a bona fide purchaser without notice and substituted #3 laches because of delay, lost evidence and Phillips' detrimental reliance on the record title [R103, A25] and #4 estoppel because of delay, Plaintiff's negligence in failing to ascertain her rights and Phillips' detrimental reliance upon the record title [R103, A25].

s/ Wilmer H. Mitchell

(Served March 16, 1976)

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"Extracts from Reply Brief of Appellant to the First District Court of Appeal of Florida"

* * *

II. THIS SUIT IS NOT BARRED BY THE TEXAS DIVORCE

Appellees have asserted that the final divorce decree in Texas bars this lawsuit. In arguing this point, Appellees misstate the facts, ignore the effect of the Texas decree and argue totally inapplicable

propositions of law.

A. Facts.

The following facts are undisputed:

(1) At the time of the divorce, the parties stipulated that, aside from their agreed distribution of property rights, no other property rights were to be determined by the divorce proceeding and were not to be submitted to the court;

(2) The final judgment entered by the Texas court provided:

> "That all issues as to the existence of disposition of community property rights, or other property rights, have, by amended pleadings filed herein been withdrawn and eliminated from this cause.";

(3) The Texas trial court in the divorce proceeding required Defendant Wise to file a sworn inventory of all assets, basing that order upon its ruling that, in the absence of such an order, that Defendant would most likely hide assets from the Appellant; and

(4)The sworn inventory filed by Appellee Wise failed to disclose the Florida property interests here in question.

* * *

(2) Appellant's authority.



Appellant has set forth in some detail the foregoing matters distinguishing Appellees' cases and demonstrating the willingness of Florida courts to review judgments obtained by misrepresentation. Nevertheless, it is not necessary to reach that point in this proceeding because the Texas court never made any determination of the property rights of the parties, and this court should not give the Texas decree a greater impact than it would have in the state of rendition.

Texas law provides that parties to a divorce proceeding may litigate their rights to community property subsequent to that divorce. In fact, any property not disposed of in the divorce proceeding is presumed to be community property absent a clear and convincing showing to the contrary. Specifically, where divorce has been granted without an adjudication of the property rights of the parties, the wife may subsequently maintain an action to sue for the protection of her community property interests. Furthermore, the wife cannot be presumed to have full knowledge of all of the property to which she may have a claim, and an inventory by commissioners appointed in the suit for divorce is not conclusive on the wife. (In this regard, see 20 Tex. Jur. 2d "Divorce and Separation" §265, a copy of which is attached hereto for the Court's reference.)

A Texas decree of divorce does not purport to make a partition of the com-

munity property between the husband and wife unless such partition is particularly set forth therein. Furthermore, any overlooked property interests are subject to review absent a "residuary clause" in the decree of the court. A Texas divorce decree does not preclude a suit by either party for such partition and the court's sole authority in such a suit is to divide equally such community property between the parties. (See Texas Family Law, "Divorce Suits and Separation," §5:72 and §5:138, copies of which are attached hereto for the Court's reference.)

The following are only a few of numerous Texas cases recognizing the propriety of Texas courts withholding disposition of all property rights in a divorce action and the subsequent right of the parties to litigate questions of community property in later proceedings dealing with property not so divided. In Blakely v. Herring, 374 S.W. 2d 677 (CCA Tex. 1964) the Texas court expressly recognized that a party to a divorce decree in which the parties' rights to certain property is not partitioned may have those property rights adjudicated in a subsequent proceeding. In Busby v. Busby, 457 S.W. 2d 551 (Tex. 1970), the Supreme Court of Texas specifically found that, where community property rights were not partitioned at the time of a divorce proceeding, the judgment entered in a divorce suit did not preclude the former wife seeking partition of the undivided community property in a subsequent suit. Numerous additional



cases could be cited on this point as the law is absolutely clear and settled in Texas that, when a Texas divorce decree does not dispose of all community property rights, a party may bring a subsequent action to litigate those interests. (See additionally Thompson v. Thompson, 500S.W. 2d 203 (CCA Tex. 1973).)

Therefore, there is ample Florida and Texas precedent for a proceeding such as this and the judgment of the Texas court is not res judicata on Appellant's interest in the subject property. No question of these interests was decided by the Texas court which would bind Appellant in greater effect in Florida.

* * *

§5:72 TEXAS FAMILY LAW

§5:72 Property not divided

A court decreeing divorce or annulment should divide the estate of the parties. The courts have pointed out the necessity for the inclusion of all of the assets when attorneys prepare for a divorce hearing. If all property owned by the community is disposed of by agreement and judgment, a subsequent suit cannot be brought. However, in a property settlement agreement not containing a clause whereby each party conveyed to the other property or property rights not specified in the agreement, and certain property interests were not covered by the agreement and were not discovered until after rendition of the divorce decree, the

agreement and the decree do not constitute an adjudication or disposition of the community property interest owned in said properties, and each spouse is entitled to an interest in said properties. The divorce decree is res judicata as to all property interests settled therein.

It has been held not to be an abuse of discretion to refuse to reopen a case five months after the entry of a divorce decree to permit evidence to be introduced as to property not disposed of by the decree, where the decree does not purport to dispose of any claim that the party might have in the property.

If the divorce decree fails to dispose of all property rights of the parties, the parties remain owners of the property as tenants in common, either spouse may sue to recover an interest as a tenant in common in any community property on hand at the time of dissolution of the marriage. The former spouses are tenants in common of community property so omitted, and partition must be sought in a new action in the district court. Either party may subsequently demand partition of the property which has not been previously divided. This rule applies to disability and retirement benefits not divided on divorce.

There is no assumption that items of property not specifically mentioned in a divorce decree were awarded to either party. A failure to deliver property not specifically mentioned cannot constitute a violation of the decree and



thus cannot be punished by contempt.

The power of the divorce court to divide property "as may be just and right" is limited to a suit for divorce. Such power cannot be exercised in a subsequent suit for the division of undisclosed community property,

In a suit for division of community property after divorce, the parties are treated as if they had never been married.

Where the only issue is a suit is the proper disposition of the community property, the suit may not, as against a former spouse's plea of privilege, be maintained in the county in which the plaintiff resides, the defendant being a resident of another county.

Since, in the absence of partition of property, divorced parties are tenants in common in the community property, the possession of one being the possession of both, the right of the community estate to claim the benefit of the wife's adverse possession of land conveyed to the husband under a tax deed is not destroyed by a divorce.

* * *

§5:138. Property of the parties

The community estate is a statutory estate, dependent on the existence of the marriage of which it is an incident, and the community estate as such is terminated on dissolution of the marriage by death, divorce, or annulment Divorced parties become tenants in common in the

former community, in the absence of a judicial partition.

If a decree of divorce does not purport to make a partition of the community property between the husband and wife, it does not preclude a suit by either party for such partition, but so long as the divorce decree stands, a spouse may not be awarded more than a half interest in such property. A partition may not be had if the divorce is invalid.

The status of the property as community is not restored by the remarriage of the parties. Each spouse thereafter deals with such property as one of the owners and not as agent or representative of the community or of the other spouse.

The fact that the husband transferred the property to the possession of others will not bar the wife's right to sue for the protection of her community interest where the rights of other persons do not intervene.

The failure of the wife in her pleadings in the suit for divorce to describe all the property comprising the community estate does not conclude or restrict her from later seeking her share of the property. It has been said that the wife cannot be presumed to have full knowledge of all the property to which she may have a claim. And neither is an inventory by commissioners appointed in the suit for divorce conclusive on the wife.



A party may also bring a separate suit to recover payment due from the other, under the divorce decree.

An action brought after divorce, for a division of community property that was not disposed of in the decree, is not an action for divorce, and the issuance of an injunction in such a proceeding without requiring the filing of a bond is error. Furthermore, bond is required in the case of injunctions against third persons.

(Served June 7, 1976)

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IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, FLORIDA

| | | |
|---|---|---|
| LOUISE ORR ESTABROOK, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | Case No. |
| | ) | 74-C-53 |
| WATSON W. WISE and | ) | |
| PHILLIPS PETROLEUM COMPANY, | ) | |
| a corporation, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

ORDER

The parties having appeared before the Court November 10, 1975, for a pretrial conference,...

* * *

3. The Defendant Phillips Petroleum Company conceded by its counsel present at the hearing that its third and fourth affirmative defenses, based upon allegations that Phillips was a bona fide purchaser without notice, cannot stand in light of the testimony developed on discovery as to the knowledge of Phillips of the potential rights of the Plaintiff at the time it made the lease with Defendant Watson W. Wise.

* * *

DONE AND ORDERED in Milton, Florida, this 3rd day of December, 1975.

s/ Woodrow M. Melvin

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-1208

LOUISE ORR ESTABROOK,
*Petitioner,*
*v.*
WATSON W. WISE and
PHILLIPS PETROLEUM COMPANY,
*Respondents.*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT**

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**BRIEF FOR RESPONDENTS IN OPPOSITION**

---

W. SPENCER MITCHEM of
BEGGS & LANE
Post Office Box 12950
Pensacola, Florida 32576
Attorneys for Respondent
Watson W. Wise
and
WILLIAM F. McGOWAN, JR. of
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Post Office Box 3239
Tampa, Florida 33601
Attorneys for Respondent
Phillips Petroleum Company

# INDEX

## CITATIONS

IN THE

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT**

---

## BRIEF FOR RESPONDENTS IN OPPOSITION

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## OPINIONS BELOW

The opinions below are as set forth in the Petition.

## JURISDICTION

The claimed basis for jurisdiction is set forth in the Petition.

## QUESTION PRESENTED

Whether a decision by a Florida appellate court that an action in Florida by a Texas resident against her former spouse to establish an interest in Florida realty was barred on the

principle of res judicata by an earlier Texas divorce decree which dissolved these parties' marriage properly presents a full faith and credit question for this Court's review, where:

I. The decision of the Florida court also rested upon other independent and adequate state grounds, and
II. Petitioner failed to follow state procedure which required that she plead and prove in the Florida trial court the applicability of Texas law to and its effect upon the defense that the Texas divorce decree was a bar to the Florida proceeding, and
III. Petitioner failed to prove in the Florida courts that the Texas divorce decree would not operate under Texas law as a bar to her action.

## CONSTITUTIONAL PROVISION INVOLVED

The claimed pertinent provisions of the United States Constitution (Art. IV, §1) are set forth in the Petition at page 4.

## STATEMENT

This is a petition for certiorari by the plaintiff[1] in the trial court from a decision of the District Court of Appeal of Florida, First District, affirming a summary judgment for defendants entered by the Circuit Court for Santa Rosa County, Florida.

The trial court did not recite the basis for its decision for defendants (PX. 44A-45A). Upon review, the District Court of Appeal concluded that there were several valid grounds upon which to sustain the trial court's judgment. It expressly held that the action by plaintiff to establish an implied trust in Florida

1 In this brief the Petitioner may sometimes be referred to as the "plaintiff". Similarly, "defendants" may sometimes be used with regard to Respondents; "PX" will be used to refer to the appendix filed by Petitioner; "RX" will be used to refer to the additional appendix filed by Respondents; "R" will be used to refer to the original record filed in the District Court of Appeal of Florida.



realty was barred by the doctrine of res judicata because of an earlier Texas divorce decree which had dissolved the marriage between plaintiff and defendant Wise.

Plaintiff filed her complaint in the Florida circuit court in 1974 to impose a trust in favor of herself upon certain mineral rights in Florida real estate held in the name of defendant Wise and leased, in part, to defendant Phillips Petroleum Company (PX. 1A-11A). Recognizing that Florida is not a community property state (PX. 5A-6A), plaintiff's complaint asserted that the *funds* used by defendant Wise to acquire the Florida interests in the 1940's presumptively belonged one-half to plaintiff by virtue of the Texas community property laws (PX. 5A).

Plaintiff and defendant Wise, both Texas residents, had been married in Texas (a community property state) in 1930. In the early 1940's, Watson Wise, then employed in his father's oil business, began a series of travels throughout Alabama, Mississippi and Florida. For the first half of that decade, Watson Wise bought and sold numerous speculative mineral interests in those states. The purchases were frequently joint purchasing arrangements brought together between Watson Wise and others (Wise depo. pp. 9-10, 17-19/R 348-49, 356-58). Funds to purchase the interests taken in Watson's name were supplied by Watson's father, Mr. W. A. Wise (Wise depo. pp. 17-18/R 346-7). The underwriting of Watson's purchases by his father was not revealed by Watson to the others with whom he dealt. (Wise depo. p. 33/R 362). Watson chose to maintain the appearance that he himself was the sole enterprising adventurer (Wise depo. p. 18/R 347). Accordingly, all of those interests appearing in Watson's name were in fact purchased with funds from Watson's father and, therefore, the equitable interest was totally in Mr. W. A. Wise (RX. A2).

The only written evidence regarding the source of funds to purchase the property is the copy of the agreement between

Watson Wise and his father, W. A. Wise. That agreement states:

October-1-1943 Tyler, Texas

To Dad:

I, Watson Wise, agree to assign any and all purchases to my father, W. A. Wise, Owens Building, S. Broadway, Tyler, all mineral leases, overrides or other land lease purchases that may be bought by me and carried in my name in Louisiana, Mississippi, Alabama, Florida, so long as W. A. furnishes the expense money and payments for the above realty. Any brokerage shall be my exclusive profit and shall apply to my expense and livelihood. If profits are realized on these after the deductions of expense of all leases, land, mineral purchases, then I shall have a one-quarter interest in the profits.

Signed,
Watson W. Wise

W.A.W.

The writing is in Watson Wise's handwriting, and is initialed by his father, W. A. Wise (RX. A3). Because Watson purchased the properties in his name with his father's funds, he and his dad felt that their agreement should be written (RX. A3).

The trading of mineral interests in Florida subsided when it appeared that the interests had no value. Mr. W. A. Wise died in 1947 (Wise depo. p. 11/R 340), after the lapse of interest in the Florida minerals. Prior to his death, however, Mr. Wise made a gift of the properties to his son, Watson, and his daughter, Ruth Ranck (RX. A2).

In 1964 Louise Orr Wise, now Louise Orr Estabrook, filed suit for divorce in Texas against Watson Wise. In that proceeding, Mrs. Estabrook sought a divorce and an adjudication of her property rights. Upon filing the divorce complaint, Respondent Wise was enjoined from going to the home of the parties and from moving or in any way secreting any of the assets of the parties or the records regarding the assets (PX. 37A-41A).



During the course of the divorce action, Respondent Wise was required to produce an inventory of his properties (PX. 40A). The parties set to work through their representatives to compile data recorded in dozens of filing cabinets (William E. Wise depo. pp. 6-9), (Turman depo. p. 14/R 443). The enormity of the task is reflected by the inventory (R 152-255) eventually prepared which shows that Watson Wise and Louise Orr Estabrook divided properties valued in the millions of dollars. The assets consisted of some three companies owned and operated by Wise, four farms, a house in Colorado, a house in Tyler, Texas, numerous bonds and savings accounts, approximately 90,000 shares of stock of 70 companies, some 80 division orders representing interests in active oil production, along with various other assets.

The interests in the Florida minerals involved in the instant case were not included in this inventory. Mr. Edgar Turman, an employee of the Wise companies who was assigned primary responsibility to assemble records and carry them to Mrs. Estabrook's attorney for security, has offered direct testimony suggesting that the records of Florida properties were simply overlooked (RX. A4). Mr. Turman appears to have had a neutral role in the proceedings, and in fact, subsequent to the divorce, worked for both Petitioner and Respondent Wise (Turman depo. p. 7/R 436; Estabrook depo. p. 29/R 497).

Prior to the entry of the final decree of divorce on May 25, 1956, the parties entered into an agreement which provided that if either party thereafter desired to claim that some community property had not been divided, then they would be free to do so (PX. 9A-11A). The final judgment, however, was entered in a form which provided only that "all issues as to the existence or disposition of community property rights, or other property rights, have, by the amended pleading filed herein, been withdrawn and eliminated from this cause." (PX. 23A).[2]

2 Although the District Court of Appeal's opinion refers to the Texas divorce decree as "incorporating the terms of the property settlement agreement between the parties" (PX. 51A), it is apparent from the decree that there was no such incorporation but rather a *withdrawal* of all property issues (PX. 23A).

Petitioner clearly had, at one time, actual knowledge of her husband's trips to Florida (RX. A5). Her statements on deposition relate that she recalled such knowledge after the inquiry by one Farrington subsequent to her divorce about leasing what he described as "her" interests in Florida (RX. A5). Also, several documents have been placed in the record which bear the Petitioner's signature and which are conveyances prior to the divorce of parts of the interests involved in this action (Estabrook depo. pp. 19-22/R 47-90). A conclusion that can be reached with respect to Petitioner's knowledge is that she did not recall her actual knowledge of her husband's business in Florida at the time of the divorce. Watson Wise has indicated that he, too, did not recall the existence of these interests at the time of the divorce (Wise depo. p. 63/R 392).

During the trial court proceedings in the instant case, Petitioner stated that the factual basis for her claim was only the Texas statutory community property presumption (RX. A1).[3] Answering an interrogatory from Respondent Phillips Petroleum Company questioning what facts were relied upon to support the allegation that community property funds were used to purchase the subject properties, Petitioner stated:

> The purchase of the subject mineral interests during the marriage, with no credible evidence being known to Plaintiff which would establish that the property was acquired other than by use of community funds; the presumptions that apply in such circumstances under Texas law (RX. A1).

While Respondents raised in the trial court a number of different defenses to Mrs. Estabrook's claims, the most important ones were those enumerated by the District Court of Appeal in its opinion (PX. 50A-51A):

3 The Texas community property statute creating this presumption and the admission of its inapplicability to property acquired by a spouse through gift or devise are set out in Petitioner's main brief (Brief of Appellant) in the District Court of Appeal. See RX. A10-A11.



1) Statute of Limitations.
2) Laches.
3) The Florida property was not purchased with community funds.
4) Petitioner's claim was founded upon a community property agreement entered into in Texas and upon the community property law of Texas which has no effect upon real property located in Florida.
5) This action was barred by entry of the Texas divorce decree between Petitioner and Respondent Wise.

The District Court of Appeal, after concluding that several of the foregoing grounds were sufficient to sustain the summary judgment for Respondents (PX. 51A), went on to discuss and expressly hold that the present action was barred by the Texas divorce decree. The Florida Supreme Court denied Mrs. Estabrook's petition for certiorari (PX. 64A).

## ARGUMENT

The petition for certiorari should be denied pursuant to this Court's long-standing principle that it will not review state court judgments based upon adequate and independent state grounds. In the present case, the Florida District Court of Appeal expressly determined that there were "several" valid bases for the trial court's summary judgment, of which only one is claimed by Petitioner to involve a federal question. One or more of the remaining grounds are not only independent state grounds, but are also adequate in the sense that they are broad enough to support the judgment of the state courts.

Moreover, the federal question Petitioner seeks to bring to this Court, *i.e.*, whether Florida courts gave full faith and credit to the Texas divorce decree, was not properly raised and developed in the Florida courts, because the application of Texas law to the effect of the divorce decree in the Florida courts was not pleaded and proved as required by Florida practice, and, in any event, Petitioner failed to prove that application of Texas law in this regard would require a different result.

I

## THE DECISION BELOW RESTS UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has consistently adhered to the principle that it will not review a state court judgment based upon an adequate and independent state ground. *Durley v. Mayo*, 351 U.S. 277 (1956); *Stembridge v. Georgia*, 343 U.S. 541 (1952); *Herb v. Pitcairn*, 324 U.S. 117 (1945). And where the state court bases its decision on both federal and nonfederal grounds, and a state ground is sufficient to sustain the judgment, this Court will not undertake to review it. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934); *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257 (1872).

Indeed, it has been said that where adequate state grounds are asserted and appear reasonable, "Petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below." *Durley v. Mayo*, 351 U.S. at 281. The burden of establishing jurisdiction is not met if "it appears that the judgment *might* have rested upon a nonfederal ground." *Stembridge v. Georgia*, 343 U.S. at 547.

As reflected by the opinion of the District Court of Appeal (PX. 49A-53A), this action was originally commenced by Petitioner in the Circuit Court for Santa Rosa County, Florida, to establish a trust in her favor in certain Florida mineral interests. Petitioner, a resident of Texas at all times, contended that during her marriage to respondent Wise from 1930 to 1964, Wise used community property funds to acquire these Florida mineral interests.

Respondents defended on a number of grounds, five of which were enumerated by the District Court of Appeal in its opinion (PX. 50A-51A). These defenses included:



1) Statute of Limitations.
2) Laches.
3) The Florida property was not purchased with community funds.
4) Petitioner's claim was founded upon a community property agreement entered into in Texas and upon the community property law of Texas which has no effect upon real property located in Florida.
5) This action was barred by entry of the Texas divorce decree between Petitioner and Respondent Wise.

After the foregoing enumeration of defenses, the Florida appellate court stated (PX. 51A):

> The trial court did not recite any specific grounds in its final summary judgment upon which to enter same. Our review of this extensive record discloses *several valid grounds* upon which to sustain same; however, we will confine our comments to the latter ground based upon the Texas divorce (emphasis added).

Petitioner, of course, seeks review in this Court because of the District Court of Appeal's comments concerning the res judicata effect of the Texas judgment. She does not discuss any of the other grounds mentioned by the court, and there is no attempt to demonstrate that grounds 1 through 4 cannot account for the lower court's decision. Under the jurisdictional tests formulated by this Court, the burden is upon Petitioner to demonstrate that not one of the first four defenses is an independent state ground which is adequate in the sense of being broad enough to account for the summary judgment in favor of Respondents. *Durley v. Mayo, supra; Stembridge v. Georgia, supra; Lynch v. New York ex rel. Pierson, supra; Klinger v. Missouri, supra.* Since Petitioner has failed to discharge this burden, further review of the decision of the District Court of Appeal should be declined by this Court.

The judgment of the Florida appellate court is expressly based upon "several valid grounds", only one of which is

asserted by Petitioner to involve a federal question. In *Klinger v. Missouri, supra,* this Court stated:

> But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case. 80 U.S. (13 Wall.) at 263.

*See also Lynch v. New York ex rel. Pierson,* 80 U.S. (13 Wall.) at 54-55.

A few years later, in *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590 (1875), this Court described the extent to which it would inquire into state law to determine the sufficiency of a state ground:

> 6. If [the federal question] was erroneously decided against plaintiff in error, then this Court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue. 87 U.S. (20 Wall.) at 636.

The independence of grounds one through four can hardly be questioned. The statute of limitations and laches are clearly matters of state law which are unrelated to the effect of the Texas divorce decree. Likewise, the question of whether, in fact, the Florida mineral interests were purchased with community funds stands completely apart from the federal question Petitioner seeks to have reviewed. The fourth ground involves the question of whether the Texas community property law and the community property agreement entered into between Petitioner and Respondent Wise shortly before their divorce can have any direct effect upon Florida real property and it does not rely upon the divorce decree in any way.



The adequacy of at least the first three enumerated grounds as a basis for supporting a judgment in favor of the Respondents is clearly apparent when measured against the standards set by this Court in *Murdock v. City of Memphis, supra.* A finding by the lower court that Petitioner's claim of interest in Florida mineral rights was barred by the statute of limitations or on principles of laches would completely dispose of the entire case. Likewise, a finding that the Florida interests were not purchased with community funds would also be broad enough for complete resolution of the action in favor of Respondents, as there was no other basis alleged in Petitioner's complaint for her claim of interest (PX. 1A-11A).

The fourth ground, *i.e.,* that the community property agreement and community property law of Texas can have no direct effect upon Florida real property, is probably not an adequate ground because Petitioner's effort in this litigation was to establish a trust in Florida real property based on an alleged community property interest in Texas funds, rather than to seek a declaration that the Florida property was itself community property. However, it is doubtful that the District Court of Appeal had this fourth ground in mind when it referred to "several valid grounds" to sustain the judgment of the trial court, for that appellate court disposed of ground four expressly during its discussion of the effect of the Texas divorce decree when it stated: "Florida is not a community property state, and thus is not required to recognize an encumbrance predicated upon a foreign state's community property law" (PX. 52A).

Ground three in the District Court of Appeal's opinion, *i.e.,* that the Florida interests were not purchased with community funds, was not only an independent and theoretically adequate basis to support the judgment for Respondents, but it was also an adequate basis in fact. In the trial court, Petitioner had largely if not entirely relied upon a certain Texas rebuttable presumption declaring the community nature of property acquired during marriage to establish her interest in the funds used by Respondent Wise to purchase the Florida mineral interests (RX. A1).

The evidence before the trial court to rebut the presumption relied on by Petitioner to establish a community property interest in the purchase funds is described in Respondents' Statement in this brief at pages 3-5, *supra*. In summary, this evidence showed that Respondent Wise used his father's funds to acquire the Florida mineral interests, pursuant to a written agreement. The property was taken in Respondent Wise's name for convenience. Shortly before his death, Mr. W. A. Wise, Respondent Wise's father, made a gift of the properties to Respondent Wise and his sister. Property acquired by one spouse by gift during the marriage is not deemed to be community property under Texas law (RX. A10).

To decide whether the Florida property was purchased with community funds, the Florida court had first to determine the nature of the Texas community property presumption, *i.e.*, whether procedural or substantive, and if found to substantive, and therefore deemed applicable in Florida, the Florida court was faced with the further question of whether the bare presumption could suffice to meet the heavy burden of proof under Florida law to establish an implied trust in real property. *See, e.g., Lofton v. Sterrett*, 23 Fla. 565, 2 So. 837 (1887), where the court stated that the evidence to establish a trust in real estate must be "...so clear, strong and unequivocal as to remove from the mind of the chancellor every reasonable doubt as to the existence of the trust." *See also Geter v. Simmons*, 57 Fla. 423, 49 So. 131 (1909). Finally, the Florida court may have been faced with the question of whether, if applicable and sufficient to create a prima facie case for imposition of an implied trust in Florida real estate, the Texas presumption was rebutted by the presence of direct, contrary evidence in accordance with the law of Florida relating to the evidentiary effect of presumptions. *See, e.g., Gulle v. Boggs*, 174 So.2d 26 (Fla. 1965).[4]

4 For a somewhat fuller discussion of these points, Respondents have reproduced in the appendix hereto certain portions of their brief in the Florida District Court of Appeal (RX. A11-A15).



Respondents submit that the lower courts certainly could have decided that the Texas community property presumption was procedural and therefore that it was not necessary to apply it in Florida. Such a decision would have left Petitioner's claim of interest with virtually no factual support. The lower court could also have well decided that in any case the presumption could not, standing by itself, meet the standard of proof necessary to create an implied trust in real estate. Or, the court could have determined that the presumption was insufficient to establish a prima facie case for imposition of a trust in the face of the direct, rebutting evidence of Respondents. Any of these rulings would have decided adversely to Petitioner the issue of whether the Florida interests were purchased with community funds and would have resulted in judgment for Respondents on this adequate and independent state ground. Because Petitioner has failed to demonstrate that this state law ground *could not* support the judgment of the District Court of Appeal, this Court should decline to grant Petitioner further review.[5]

## II

## IN THE TRIAL COURT THE PETITIONER NEITHER PLEADED NOR PROVED THE APPLICABILITY OF TEXAS LAW TO RESPONDENT'S AFFIRMATIVE DEFENSE THAT THE PRIOR TEXAS DIVORCE JUDGMENT WAS A BAR TO THIS PROCEEDING.

Respondent Wise asserted the Texas final judgment of divorce as a bar to the present action as his affirmative defense number six (PX. 21A). The Petitioner filed a simple denial to this affirmative defense (PX. 25A). She made no attempt either to plead or to prove the applicability of Texas law to this defense, although Florida law specifically requires a party relying on foreign law to plead the law upon which she relies.

5 The District Court of Appeal could also have based its affirmance of the trial court's summary judgment for Respondents on the independent defense of laches. Rather than extend further this portion of the brief, Respondents have reproduced in the appendix hereto that section of their brief in the Florida appellate court dealing with laches (RX. A15-A19).

*See Movielab, Inc. v. Davis*, 217 So.2d 890 (Fla. 3d Dist. Ct. App. 1969), and the numerous authorities cited therein.

In argument before the trial court on this issue, Petitioner confined herself solely to the application of the law of the State of Florida (See that portion of Petitioner's brief to the trial court directed to this issue RX. A5-A10). In the absence of any pleading or proof of Texas law on this issue, the Florida trial court correctly applied the law of Florida in determining that the Texas final decree of divorce entered some ten years earlier barred this suit. *Coyne v. Coyne*, 325 So.2d 407 (Fla. 3d Dist. Ct. App.), *cert. denied*, 339 So.2d 1168 (Fla. 1976); *United Mercantile Agencies v. Bissonnette*, 155 Fla. 22, 19 So.2d 466 (1944).

In her reply brief in the District Court of Appeal, the Petitioner for the first time in this lawsuit attempted to argue the applicability of Texas law to the question of whether she was barred from bringing this action to determine the title to Florida property by the prior final judgment of divorce.

The Respondents immediately filed with the appellate court a supplemental brief citing the well established Florida rule that if a litigant is to rely upon the law of a foreign state, she must plead and prove that law at the lower court level (RX. A19-A21).

In order for the applicability of foreign law to be raised as an issue on appeal, the foreign law must have pleaded and proved at the trial court below. *See Movielab, Inc. v. Davis, supra*, and *Miller v. Shulman*, 122 So.2d 589 (Fla. 3d Dist. Ct. App. 1960), where the court stated the applicable appellate principle as follows:

> The absence from the record of both pleading and proof of foreign law precludes our consideration of this contention raised for the first time in appellant's brief. 122 So.2d at 590.



The failure of Petitioner to plead, present proof or request the trial court to take judicial notice of the law of Texas and its applicability to this issue precluded the consideration of Texas law by the District Court of Appeal. The Petitioner's presentation of Texas law and argument of its applicability for the first time in her reply brief in the Florida District Court of Appeal was too late to raise a full faith and credit question under the constitution because the Florida District Court of Appeal was required to review the judgment of the trial court in light of the law and evidence presented to the trial court. For the same reason, the Florida Supreme Court was precluded from considering Petitioner's argument as to Texas law on the petition for certiorari, which it denied without opinion.

A federal question which the highest court of a state is, by its settled practice, required to disregard because it was not seasonably raised in the trial court, will not serve as a basis for jurisdiction of this court. Such non-compliance with local procedural rules is an adequate state ground for the decision below. *Durley v. Mayo, supra; Edelman v. California*, 344 U.S. 357 (1952); *Hulbert v. City of Chicago*, 202 U.S. 275 (1906); *Mutual Life Insurance Company of New York v. McGrew*, 188 U.S. 291 (1903).

As the Texas law was not properly brought to the attention of the Florida courts, the Petitioner has omitted an essential step in invoking the full faith and credit clause. *Gasquet v. Lapeyre*, 242 U.S. 367 (1917); *Hanley v. Donoghue*, 116 U.S. 1 (1885).

## III

## PETITIONER FAILED TO MEET HER BURDEN OF PROVING TO THE FLORIDA COURTS THAT THE FINAL DECREE OF DIVORCE WOULD NOT OPERATE AS A BAR TO THESE PROCEEDINGS UNDER TEXAS LAW.

Although the Petitioner contends that the Texas divorce judgment would not have barred these proceedings in Texas,

she neither pleaded, sought judicial notice of, introduced into evidence nor cited in her briefs filed with the Florida appellate courts any Texas authority directly on point.

The Petitioner does cite portions of articles on Texas law and several Texas cases, including, *Thompson v. Thompson*, 500 S.W.2d 203 (Tex. Civ. App. 1973), and *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970), which hold that where all *community property* rights are not partitioned in a divorce decree, the judgment does not preclude a later suit seeking partition of undivided community property. There are other Texas cases which raise doubt that such is the law of Texas and indicate that the final decree of divorce is a bar to a subsequent proceeding seeking to partition property not presented to the divorce court. *See Ladd v. Ladd*, 402 S.W.2d 940 (Tex. Civ. App. 1966), *writ refused n.r.e.; Cannon v. Cannon*, 43 S.W.2d 134 (Tex. Civ. App. 1931), *writ refused*.

To the extent that the Texas courts allow parties to seek partition of community property which was not partitioned in the final divorce proceedings, they appear to do so because of the nature of community property in Texas, where the courts state: "An interest in community property is not a claim or right *against* the other spouse." *See Thompson v. Thompson*, 500 S.W.2d at 208. A careful reading of the opinion and dissent in *Busby v. Busby, supra*, indicates that the Texas Supreme Court would have found that action barred by res judicata if the majority had not determined that disability pay was community property.

In matters not involving community property, the law of Texas is in harmony with the law of Florida in holding that under the rule of res judicata a final judgment of divorce bars relitigation of all issues connected with a cause of action or defense which either were or might have been presented to the divorce court and determined thereby. *See Doherty v. Doherty*,



279 S.W.2d 690 (Tex. Civ. App. 1955); *Townsend v. Townsend*, 115 S.W.2d 769 (Tex. Civ. App. 1938).

Texas courts recognize that real estate in Florida held only in the name of the husband is not community property; it is the husband's separate property. *See Bell v. Bell*, 180 S.W.2d 466 (Tex. Civ. App. 1944), *writ refused; Walker v. Walker*, 231 S.W.2d 905 (Tex. Civ. App. 1950). They further recognize that the wife's claim to an interest in the husband's separate Florida property is a claim against her spouse which she could and should have made in the divorce action. *See Walker v. Walker, supra.*

It is, therefore, logical to conclude that if Petitioner had pursued this case in Texas, where she originally filed it, the Texas courts would not have followed their rule in regard to community property. As this is an action by which Petitioner seeks to compel Respondent to grant her an interest in his separate Florida property, the Texas courts would most likely have applied the rule of res judicata as it is generally applied in both Texas and Florida and held that the Petitioner is barred by the final divorce judgment.

If Petitioner had properly placed the issue of Texas law and its application before the Florida courts, she would have had the burden of showing the Florida courts that under Texas law the final judgment of divorce does not constitute the res judicata bar it does in Florida. Even if the authorities she presented in her briefs were considered, she did not meet her burden since those authorities speak only of community property, which is not here involved. This is particularly true as the Texas law in regard to the general application of the rule of res judicata to final judgments of divorce appears to be in harmony with the law of Florida. Petitioner simply has not shown any Texas authority that the final divorce judgment would not be a bar to this later proceeding in which the wife seeks an interest in her husband's separate property that she could have sought at the time of the divorce ten years earlier.

It follows that the Florida courts did not violate the full faith and credit clause when they held this action barred by the final judgment of divorce. *See Simons v. Miami Beach First National Bank*, 381 U.S. 81 (1965).



## CONCLUSION

Petitioner has failed to demonstrate that she is entitled, under this Court's jurisdictional guidelines, to review by certiorari. Rather, she has attempted to argue again the merits of her claim which she has already pursued without success through three levels of Florida courts. In her attempt to secure review by one more court, she has sought belatedly to inject into the case a full faith and credit question which was never properly raised in the Florida courts. Petitioner has also overlooked the presence of adequate and independent state grounds for the judgment below.

For the foregoing reasons, certiorari should denied.

Respectfully submitted,

W. SPENCER MITCHEM of
BEGGS & LANE
Post Office Box 12950
Pensacola, Florida 32576
Attorneys for Respondent
Watson W. Wise

and

WILLIAM F. McGOWAN, JR. of
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Post Office Box 3239
Tampa, Florida 33601
Attorneys for Respondent
Phillips Petroleum Company

**PROOF OF SERVICE**

I HEREBY CERTIFY that on this 28th day of March, 1978, three copies of the Brief for Respondents in Opposition and Appendix were mailed, postage prepaid, to Wilmer H. Mitchell and Lawrence W. Oberhausen, 130 East Government Street, Pensacola, Florida 32501, counsel for the Petitioner. I further certify that all parties required to be served have been served.

William F. McGowan, Jr.

WILLIAM F. McGOWAN, JR. of
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Post Office Box 3239
Tampa, Florida 33601
Counsel for Respondent
Phillips Petroleum Company



# APPENDIX

## INDEX TO APPENDIX





## PORTIONS OF INTERROGATORIES OF DEFENDANT, PHILLIPS PETROLEUM COMPANY, TO PLAINTIFF, LOUISE ORR ESTABROOK

IN THE
CIRCUIT COURT FOR SANTA ROSA COUNTY, FLORIDA

CASE NO. 74-C-53

LOUISE ORR ESTABROOK,
*Plaintiff,*
*vs.*
WATSON W. WISE and
PHILLIPS PETROLEUM COMPANY, a Corporation,
*Defendants.*

(R. 80)

---

INTERROGATORIES OF DEFENDANT, PHILLIPS PETROLEUM COMPANY, TO PLAINTIFF, LOUISE ORR ESTABROOK

Defendant, PHILLIPS PETROLEUM COMPANY, by its undersigned attorney, hereby propounds the following Interrogatories to be answered by Plaintiff, LOUISE ORR ESTABROOK, in writing and under oath within the time allowed under the Florida Rules of Civil Procedure:

1. With regard to your allegations in paragraph 9 of the Complaint that "all of the interests in lands . . . described in this paragraph were acquired with community funds of Plaintiff, LOUISE ORR ESTABROOK, and Defendant, WATSON W. WISE . . .," please state with particularity:

a. The facts you rely upon.

The purchase of the subject mineral interests during the marriage, with no credible evidence being known to Plaintiff which would establish that the property was acquired other than by use of community funds; the presumptions that apply in such circumstances under Texas law.

* * * * * *

## EXCERPTS FROM DEPOSITIONS

### DEPOSITION OF WATSON W. WISE (R. 368-370, 400)

Direct Examination

* * *

By Mr. Mitchell:

[39] Q What I'm getting at is, for all of these interests that you acquired in your name and retained in your name at the time you acquired them. As between you and your father, who owned them?

A They were my father's.

[40] Q One hundred percent?

A My father had not told me that the boom was over. And my father later on told me, before he died, and I think my sister was there. And he said, "Well, if this is any good, you children have at least got something to make you some money." But these belonged to my dad.

* * * * *

Q Excuse me. I'm not interested in the rig. I'm talking about what we've got in this law suit.

A He paid for these. He paid for these. They were his. And before he died he told my sister and me. "If they ever amount to anything, why, you can have them."

Q Well, are you saying he gave you these properties or not?

[41] A Before he died.

* * * *

Q So, you then maintain that these interests which were purchased in your name were given to you and your sister, Ruth Rank, before your father died. Is that correct?

A He told us that they were ours. Yes.

* * * *



[71] Q There has been shown in various depositions and things, a memorandum dated October the 1st, 1943. It's in handwriting on lined paper.

A Yes.

Q It is in this —

A I'm familiar with it.

Q — Mr. Hodges' deposition, Joint Exhibit Number 1.

A Yes.

Q I probably should ask you to tell me if that is your handwriting, for instance, on the major portion of that.

A Yes. It is my writing.

Q And it says: "To Dad, Watson Wise, et cetera." Did you, yourself write that?

A Yes. I wrote that.

Q It has the date October 1, 1943. Was that date [72] written on at the time that this was done?

A All done at one time.

Q Do you recall actually the circumstances of when and where this was done?

A No, not exactly. Dad and I at one time or another, we were together. I think I was maybe going away, and I might have said, "Dad, maybe we should kind of have some kind of understanding about this thing. We've talked about it." And we just wrote a little memorandum out some place. I forget where it was.

Q Did you see him initial it at the bottom? Do you know those are his initials?

A Well, I can recognize my father's. I've got lots of papers that I have his initials on. And I recognize those as Dad's. Those are his initials.

Q Those are his initials?

A Those are my dad's initials.

Q Did he initial them in your presence?

A I think so.

* * * *

DEPOSITION OF EDGAR TURMAN (R. 442)

Direct Examination

* * *

By Mr. Mitchell:

[13] Q You were told then to get up all the property you could find. Would that be correct?

A That is correct.

Q Now, we have copies of that inventory submitted by Mr. Wise. And it does not contain any of the property that is currently involved in this law suit in Santa Rosa County, Florida. And the properties that we are talking about are in several Florida Counties, their mineral interests. Can you explain why those properties were not listed in that inventory? If you know.

A To the best of my knowledge, the reason that that or any other non-producing mineral properties, were excluded, was that they were just looked over. The problem is recalling ten years back. It's not easy. But, I worked on this thing almost a year, and somewhere in the shuffle, the non-producing minerals of some amount were overlooked. At the time I finished up with the situation I thought that I had everything pretty well nailed together, but obviously we didn't.

* * * * *

DEPOSITION OF LOUISE ORR ESTABROOK

(R. 482-83, 510)

Direct Examination

* * *



By Mr. Mitchem:

[14] Q When did Mr. Wise first start going to Mississippi, Alabama and Florida?

A I wouldn't remember. In fact, the first time that I did remember that he had gone to those specific places was when Mr. Farrington called me and asked me if I knew I had some property in Florida.

[15] Q You do remember him going now, don't you?

A After I talked with him on the phone, then I set down and tried to think. Because, I said, "No. I don't have any." And I did remember that he had gone to Florida. But that was the first recollection that I had.

* * * *

[42] Q Mrs. Estabrook, please tell me when you first, and I'll use the word 'remembered', since I know you must have known in '43 or '44 that he was over in Florida, when you first remembered he was over in Florida buying or looking after oil interests, or something, for anybody?

A Not until whenever it was that Mr. Farrington called me.

* * * * *

EXCERPT FROM PLAINTIFF'S BRIEF IN TRIAL COURT ON MOTION FOR SUMMARY JUDGMENT

* * * *

Is the Plaintiff Barred
by the Texas Divorce Action?

[39] Defendant Wise contends pursuant to his sixth affirmative defense that the Plaintiff is barred by virtue of the final decree of divorce entered in the Court of Domestic Relations in Smith County, Texas, May 25, 1965. Defendant Wise makes this contention in spite of the fact that the inventory he filed in the case did not list these properties, in spite of the fact that the stipulation of the parties of May 18, 1965, specifically provided,

> "...if it should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto.";

and in spite of the fact that the judgment in the divorce entered May 25, 1965, found,

> "...that all issues as to the existence of disposition of community property rights, or other property rights, have, by the amended pleadings filed herein, been withdrawn and eliminated from this cause."

[40] Defendant Wise by his memo (p. 3) asserts that it is well settled that a final decree of divorce settles all property rights of the parties and bars any action thereafter by either party to determine property rights "since the doctrine of res judicata is applicable even where property rights are not put in issue, if the issue could have been raised." Mr. Wise cites 10A Fla. Jur., *Dissolution of Marriage*, §269; *Finston v. Finston*, 160 Fla. 935, 37 So. 2d 423 (1948); *Dotter v. Dotter*, 147 So. 2d 209 (2 DCA Fla. 1962); *Jones v. Jones*, 140 So. 2d 318 (3 DCA Fla. 1962); *McEachin v. McEachin*, 154 So. 2d 894 (1 DCA Fla. 1963); and *Cooper v. Cooper*, 69 So. 2d 881 (Fla. 1954). These citations will be reviewed in detail since they do not support the Defendant's contention.

The obvious and vital distinction in *Finston v. Finston, supra*, is that the property rights in question were before the Court and there was no fraud involved. As the Court stated at page 937,

> "It further appears from the pleadings in the named suit that the property rights in question were before the Court when final decree was entered and were adjudicated, so that the doctrine of res adjudicata was a proper defense to raise here and should have been permitted."

In *Dotter v. Dotter, supra*, there was no contention that property of the parties had been fraudulently or otherwise concealed. The property in question was before the trial court as revealed by the Dotter opinion at page 210:



> "Before the Chancellor in the divorce proceeding were the property rights of the parties. The final decree was rendered, as we have indicated, and no appeal from it has been taken."

[41] Therefore, the Second District held that subsequent orders by the same trial court relating to property rights were not proper. The case has no application to a situation in which property was not revealed during the divorce proceeding, where the parties withdrew the division of property from the consideration of the court and reserved rights to seek a fair division of any property subsequently revealed, where the judgment of the court stated that property questions were not before the court, and where the subsequent action is not an attempt to have the trial court modify its order after the time for appeal is run, but rather, is a separate action upon equitable principles to establish rights in property which had not been previously disclosed.

The parties to *Jones v. Jones, supra*, had been previously divorced in Kentucky. The Kentucky decree approved a settlement of property rights which included a full release by the wife. The husband's interest in a certain Hub Trust on Florida realty was known and considered at the time of the Kentucky settlement which was approved by the Kentucky decree. This is made clear from the Jones opinion at page 320:

> "John's interest in the Hub Trust was known and taken into consideration at the time of the property settlement involved in the divorce proceeding..."

Subsequently the wife brought a suit in Dade County, Florida, to establish a resulting trust in the same Hub Trust properties. In this situation the Florida court rightfully declined to re-open the property question since it had previously [42] been adjudicated and there were no allegations of fraud or concealment.

In *McEachin v. McEachin, supra*, a Florida Circuit Court entered a final decree of divorce and determined property rights. The trial court retained jurisdiction,

> "for the entry of such other and further orders as may be proper herein, and for the purpose of modifying any orders herein." (p. 895)

This was done in July of 1962 and in September of 1962 the husband asked for change of visitation and custody rights. At that time the trial court modified its final decree as to property rights.

The First District held that the Chancellor could modify custody questions but could not modify property rights since there are different bases for retaining jurisdiction permissible as to custody but not permissible as to property. Note that the property rights in question and the specific property involved were before the court when the original order was entered.

The McEachin case stands for nothing more than to indicate that mere general language reserving jurisdiction cannot bestow jurisdiction otherwise lost by final decree and no appeal. Such a holding had nothing whatsoever to do with fraud, undisclosed holdings and other causes which would invoke the "recognized processes of equity," as recognized by the First District in McEachin at page 87 citing *Cortina v. Cortina*, 98 So. 2d 334 (Fla. 1957). The Plaintiff here is seeking a recognized process of equity to establish a resulting trust.

[43] In *Cooper v. Cooper, supra*, a divorce was granted involving a written agreement of settlement. Deeds were executed to the husband per the agreement.

The wife brought a new suit to set aside the deeds claiming threats and force ("pinching legs," e.g.). The Appellate Court said that the subsequent suit was improper and attempted to retry the divorce. The key point was that all the matters alleged with reference to threats and force were known by the wife during the divorce, and obviously such matters had to be raised in the divorce action and not in a subsequent action. It was only in that context that the Cooper court barred a relitigation of property rights which could have been introduced in the divorce litigation even though they were not so introduced.

The Cooper holding was not authority and was never intended to be authority to preclude an action such as the case at bar. This is amply demonstrated by this statement from the opinion of the Florida Supreme Court at page 884:

> "...Nothing now relied upon was discovered by Appellee after the divorce case was ended. All the circumstances



> surrounding the execution and delivery of the deeds were as well known to Appellee when they were happening and the divorce suit pended as they were when she filed the bill in the immediate case."

The distinction between the situation in Cooper and the present case is notable.

Each of the cases cited by the Defendant Wise on the subject of the finality of a divorce decree as to property rights of the parties has been reviewed above to show that none of the [44] cases involved any situation such as that in the case at bar, and the Florida cases cited by the Defendant make no attempt to bar and, in fact, implicity [sic] recognize the propriety of a subsequent case to resolve property rights which were not before the divorce court, which would include cases of fraud or other concealment of assets entitling a Plaintiff to seek the recognized processes of equity.

It should be noted also that subsequent Florida cases cited in 10A Fla. Jur. *Dissolution of Marriage* §258 footnote 14 show that Florida has recognized that a chancellor may enter a post final decree order making an adjudication relative to the determination of property rights, at least where the parties have so agreed and the rights involved are a wife's claim to a special equity in certain of the property. *Farr v. Farr*, 249 So. 2d 761 (3 DCA Fla. 1971). The Florida Jurisprudence section indicates that it is not entirely clear whether a divorce court has power to retain jurisdiction citing *Sistrunk v. Sistrunk*, 235 So. 2d 53 (4 DCA Fla. 1970) on the other side of the question. However, the holding in *Farr v. Farr* has since been approved in *Hyman v. Hyman*, 310 So. 2d 378 (3 DCA Fla. 1975) and followed in the later Fourth District case of *Becker v. King*, 307 So. 2d 855 (4 DCA Fla. 1975). Thus, it is seen that the bar urged as iron-clad by the Defendant Wise is subject to exception and does not purport to preclude action such as the Plaintiff brings here.

The weakness of the Defendant Wise's contention on this point is aptly demonstrated by the strained argument (pages 4 and 5 of Mr. Mitchem's memorandum on this point) that the "interest [45] here in question could have been put in issue in the Texas proceeding, if the parties had desired to do so..." Also, the defense memo argues that Mrs. Estabrook could have received fair treatment if she had "...bothered to bring the

Florida interests to the attention of the Court or otherwise dispose of the same." In the face of the facts that Watson W. Wise, manager and trustee of the community property, failed to reveal in a sworn inventory the existence of these interests, and that Mr. Wise lamely contends that he himself overlooked these interests, it is outrageous to suggest that Mrs. Estabrook did not "bother" to have these interests adjudicated because she did not "desire" to do so.

Defendant Wise contends at page 5 of his memo on this point (citing *Walker v. Walker* which will be treated fully below) that Mrs. Estabrook is somehow barred by the stipulation and order on the basis that the stipulation applied only to community property and is not applicable to the Florida property in question. Such an argument defies the plain intent and language of the stipulation and the judgment entered pursuant thereto indicating that all matters with reference to "community property rights or other property rights" are eliminated from the cause with the parties retaining their rights to pursue any after-discovered assets.

* * * * *

**EXCERPTS FROM BRIEF OF APPELLANT IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.**

* * * *

[18] Community property consists of all property acquired during the marriage other than by gift, devise or descent or in exchange for separate property and also includes the income of all property of the spouses, both separate and community. Tex. Family Code §5.01(b).

* * * *

[19] At all times material to the disposition of this controversy, Article 4619 of the Texas Revised Civil Statutes was in full force and effect. That statute reads in part as follows:

> "Article 4619. — Community Property
> §1.



> All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the community property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only..."

* * * *

**EXCERPTS FROM BRIEF OF APPELLEES IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.**

* * * *

[15] As a general rule, it is stated that presumptions are procedural matters and the forum need not apply presumptions arising in other jurisdictions. *See Annotation, Governing Laws as Regards Presumption and Burden of Proof,* 78 A.L.R. 883 (1932); *Leflar, supra,* at 124.

The Florida Supreme Court has stated that questions of presumptions are for the law of the forum to resolve. *United Mercantile Agencies v. Bissonnette,* 155 Fla. 22, 19 So.2d 466 (1944). Also, it is noted in 6 *Fla. Jur., Conflict of Laws* §41 that questions of evidence, which encompass presumptions and burdens of proof, are governed by the law of the forum. In other words, the general rule is that presumptions from other jurisdictions do not apply in proceedings in Florida. This initial inquiry thus suggests that the Texas presumption can have no bearing on this Florida court's determination of appellant's rights in the consideration used to purchase the Florida real property.

The appellees recognize that other jurisdictions have created an exception to the general rule noted about presumptions. Sometimes the presumption is said to be more than procedural, being conclusive and irrebuttable, or so [16] inextricably bound to a right that it is deemed "substantive." The exception provides that in such cases the presumption from another jurisdiction is to be applied in the forum state. *Annotation,* 78 A.L.R. at 888. Appellees urge, on several bases,

that the Texas community property presumption is not within such an exception, but is a procedural matter only, which need not be applied in this court.

Evidence of the procedural nature of the presumption is found in several sources. The first very important indicia that that presumption has only evidentiary effect, and is not substantive, is the fact that in Texas the presumption merely causes a shift in the burden of production of evidence. The presumption does not shift the burden of proof (persuasion) on the issue of the character of property as community or separate. *Gillespie v. Gillespie*, 110 S.W.2d 89 (Tex. Civ. App. 1937); *Daggett v. W. B. Worsham & Company*, 264 S.W. 180 (Tex. Civ. App. 1924). As stated in the Treatise on Texas Evidence by Dean McCormick, noted authority and author of *McCormick's Handbook of the Law of Evidence:*

> It is no where denied that the presumption has at least the effect of placing the burden of evidence on the party asserting the separate character of the property. But whether it has any effect on the burden of persuasion is more difficult problem and a matter on which our courts are not in agreement. A part of the difficulty results from the indiscriminate use by our courts of the term "burden of proof." A further complication is the failure generally to
> [17] indicate where the burden of persuasion should rest in the first place. The statement is often made that the burden of proof rests upon the party asserting the separate character of the property. In some cases the location of the burden or persuasion is made to depend upon whether the separate character of property was pleaded, or whether the party merely pleaded a general denial to the opponent's assertion that the property was community. It is believed that this distinction is unsound. The better view is represented by those cases which hold that the burden of persuasion is not affected by the presumption. *McCormick and Ray, Texas Law of Evidence*, §116.

More recently, the Texas Supreme Court in *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354 (Tex. 1971), in a case dealing with another presumption, asserted that in Texas presumptions do no more than shift the burden of going forward with the production of some evidence. Later in *Wohlenberg v. Wohlenberg*, 485 S.W.2d 342 (Tex. Civ. App.



1972), the *Robertson Tank Lines* rationale was applied to the community property presumption, further reinforcing the view of Dean McCormick. It should be noted, too, that the community property presumption is unquestionably rebuttable. *Hodge v. Ellis*, 277 S.W.2d 900 (Tex. 1955). This is further evidence of its procedural nature.

Finally, in assessing whether this presumption is but a procedural matter, it is helpful to consider what effect upon other states' real property may have been intended with the enactment of the statutory presumption. Texas does follow [18] the usual rule that real property is exclusively subject to laws of the sovereignty within whose territory it is situated, *Erwin v. Holliday*, 131 Tex. 69, 112 S.W.2d 177 (1938). In the case of *Bell v. Bell*, 180 S.W.2d 466, 469 (Tex. Civ. App. 1944), it is stated:

> The status of lands, as to being separate or community, is to be determined by the law of the state where they are situated.

It may be supposed that the presumption is not intended to be applied where, as here, it would alone be the basis for an implied trust in Florida real property. To say so suggests that a procedural device, without more, rises to the level of clear, strong, unequivocal evidence necessary to show an implied trust. *Lofton v. Sterrett, supra.*

The presumption, being a procedural device, need not be applied by this court. Without the aid of this presumption, appellant admittedly cannot substantiate any interest in the consideration used to purchase the property, and it follows that no interest could then be shown in the real property. For this reason the appellees urge that summary judgment was properly entered in their favor.

* * * * *

[20] Returning to the particular questions raised in the beginning of this section, attention is now directed to the following: how, or by what quality of evidence, can the presumption be rebutted? Appellant would have this court believe that the answer to this question is certain. The appellees

disagree. Turning once again to the work of Dean McCormick, the authority on Texas law relied upon by appellees, the following is noted:

> Closely interwoven with the matter just discussed is the degree of evidence required to overcome the presumption. Here again there is conflict in the decisions. Frequently the courts say the presumption can only be overcome by "clear and convincing evidence." The problem is partly statutory in origin since one of the clauses of Article 4619 includes the requirement of "satisfactory proof." Based upon the wording of the statute the Supreme Court has made what is believed to be a questionable distinction between property "acquired during the marriage" and property "possessed upon dissolution of the marriage," saying that as to the former only a preponderance of evidence is required to overcome the presumption of community. [Citing *Page v. Henderson*, 129 Tex. 652, 106 S.W.2d 673 (Com. App. 1936)]. On the other hand there is authority to the effect that the mere production of evidence of the separate character of the property will destroy the presumption and leave the burden of persuasion on the Party asserting that
> [21] the property is community. [Citing *Daggett v. W. B. Worsham & Company*, 264 S.W. 180 (Tex. Civ. App. 1924)]. *McCormick and Ray, supra*, §116.

In this same section above quoted, Dean McCormick also notes the "settled rule that it is error to instruct the jury that any issue requires proof greater than a preponderance of evidence," citing *Sanders v. Harder*, 148 Tex. 593, 227 S.W.2d 206 (1950). Thus, though the Texas law is apparently not certain, it seems safe to say that the community property presumption may be overcome with less than "clear and convincing" evidence.

* * * * * * *

[22] The Texas Supreme Court has set forth its view of a rebutted presumption in the *Robertson Tank Lines* case, *supra*. The effect of rebuttal is to make a presumption vanish, or as more particularly stated:

> . . .[in the face of positive rebuttal] the presumption is nullified and the burden is then upon the plaintiff to



> produce other evidence or his cause fails. . .(emphasis the court's)." 468 S.W.2d at 358.

Moreover, the court in *Robertson Tank Lines* held that the facts giving rise to the presumption, without additional affirmative evidence, did not even constitute probative evidence of the presumed conclusion. *Id.*

[23] This court is familiar with the related Florida rule that when a rebuttable presumption is met with rebutting evidence, the presumption vanishes and is of no probative value. *See Gulle v. Boggs*, 174 So.2d 26 (Fla. 1965); *Nationwide Mut. Ins. Co. v. Griffin*, 222 So.2d 754 (4th DCA Fla. 1969).

Appellees therefore argue that appellant has no basis for her claim, even if the device of the Texas presumption should be held applicable in this Florida forum. The result is that her claim was properly denied on summary judgment because she has no basis to substantiate it.

* * * *

III

[31] APPELLANT IS BARRED BY LACHES FROM NOW ASSERTING ANY CLAIM IN THE FLORIDA REAL PROPERTY.

Another issue brought to the circuit court by the motions for summary judgment was that of laches. The defendants there argued that even if there should be some technical basis to now give appellant an interest in the Florida property, then nevertheless any claim based upon that interest must now be barred under the equitable doctrine of laches.

Laches is a kind of negligence in failing to seasonably assert rights, or allowing an unexcusable delay in the assertion of rights during which time adverse rights to premises have been acquired which make it inequitable to displace the adverse rights. Equity will ordinarily deny relief to a complainant guilty of laches. 21 *Fla. Jur., Limitation of Actions*, §§91 et seq. Often a court will turn to statutory periods of limitation as an appropriate guideline in determining a suitable period to define laches. *General Properties Company v. Rellim Investment*

*Company*, 151 Fla. 136, 9 So. 2d 295 (1942). The appropriate statutory period of limitation applicable to the case at bar is found in §95.23, *Florida Statutes*, (1973) [now in the new §95.231], providing in part:

> After the lapse of twenty years from the record of any deed . . . purporting to convey lands no person shall assert any claim to said lands as against the claimants under such deed . . . , or their successors in title.

[32] A cause of action very similar to that asserted by appellant was barred by laches in the case of *Wadlington v. Edwards*, 92 So.2d 629 (Fla. 1957). In *Wadlington*, a widow asserted a beneficial interest in land acquired by her husband in 1934. The title was taken in the name of her husband alone, and the widow alleged that the title was taken in her husband's name against her will and without her knowledge or consent. She claimed that the purchase price was paid with funds from her separate estate, thus giving rise to her equitable interest.

The Supreme Court in *Wadlington* first disposed of the question of the kind of implied trust sought to be impressed against the property. The Court found that what was at issue was a "constructive" trust, and not a resulting trust. It should be noted that under the guidelines there delineated, the appellant can only be seeking application of the constructive trust remedy. The essential difference of the two implied trusts is the element of intent. A resulting trust depends upon the intent of the parties, and it is essential that the intent to create the claimed interest be found. On the other hand, a constructive trust is but an equitable remedy, not a "trust" at all, which is applied in spite of or contrary to the parties' intent. 96 So.2d at 631. The constructive trust is created to prevent unjust enrichment, whether it arises from fraud, abuse of confidence, or even from mistake. *Id.* Nothing suggests that Watson Wise intended for the appellee [33] to ever have any interest in the property at issue. At the time the properties were purchased, appellee Wise clearly understood and intended that they were his father's because they were purchased with his father's funds. (Watson depo. p. 17, 21/R 346, 350). Later, Watson's father gave the properties to him and to his sister (Watson depo. p. 41/R 370), at which time the properties became a part of Watson's separate properties. As acknowledged by appellant,



(Estabrook depo. p. 6/R 474), appellee Wise was accustomed to having and maintaining certain properties as his sole properties throughout the marriage.

In *Wadlington* the Supreme Court went on to hold that because a constructive trust has its inception in an antagonistic relationship, any rights of the beneficiary accrued at one of the following times: when the deed was recorded, when the beneficiary knew of a potential right, or when the beneficiary should have known of the adverse claim of the asserted trustee. 92 So.2d at 632.

The following facts are important in comparing *Wadlington* and the instant case. The evidence shows that Watson Wise purchased the properties in issue and in some cases recorded the deeds therefor, in the period of about 1944-46 (Complaint, p. 3/Interrogatory to Watson No. 3(d)). Other evidence suggests that the appellant had actual knowledge of her husband's Florida transactions because she eventually recalled some of them. In her own deposition, the appellant related several times that [34] once her memory was jogged by the enticement of Mr. Farrington's proposal, she did indeed begin to piece together recollections of her husband's business, (Estabrook depo. p. 15, 43, 65/R 483, 511, 533). She was raised in the oil business, (Estabrook depo. 4/R 472), and she knew that frequent travels to secure mineral interests were a part of that business (Estabrook depo. p. 15/R 483). Indeed, she knew that her father and husband had business dealings together, (Estabrook depo. at 12/R 480). It was stated by Mr. Edgar Turman that the appellant told him "...that she recalled there had been some trips over there and back [to Florida]. And she did recall that during that time there was some business done in that area [Florida], but that she was not aware of exact particulars...." (Turman depo. p. 35/R 464). Other facts in the case suggest that appellant had actual knowledge of her husband's transactions or should be imputed with such. As previously noted, not only were deeds recorded in the transactions of public record for decades, but also in some cases the appellant actually signed subsequent deeds reflecting transactions in which her husband transferred interests first acquired around 1945. (Estabrook depo. p. 19-22/R 487-490).

The doctrine of laches is never applied as a bar by virtue of nothing more than delay. *Anderson v. Northrop*, 30 Fla. 612,

12 So. 318 (1892). It is said that an ad interim [35] third party must act to his detriment in reliance upon such neglect, or that the delay must operate to the disadvantage of this other party. *See Seaboard All Florida v. Underhill*, 105 Fla. 409, 141 So. 306 (1932). Here we have defendant Phillips interposed as a third party who reasonably relied upon the state of the record title of these properties in Mr. Watson Wise.

A compelling equity may be found upon considering the basic rationale for limitations upon actions. Namely, limitations are designed to prevent undue delay in bringing suits on claims and to suppress fraudulent and stale claims after vouchers and evidence are lost and after facts have become obscure from the lapse of time, defective memory, or the death and removal of decisive witnesses.

It is a fact that here important evidence regarding the character of this property is forever lost. Numerous important, perhaps decisive witnesses are now dead. For example, among the deceased are: William A. Wise, father of appellee Wise, and one who would obviously be vital to establish the validity of the claim that the funds came from the father (Watson depo. 11/R 340); Robert Windfohr, friend and confidant of Watson who may have known of Watson's arrangements (Watson depo. p. 33/R 362; Estabrook depo. p. 16/R 484); R. J. Ranck, brother-in-law of Watson Wise, who not only knew of the arrangements made by William A. Wise, but who also was offered the very [36] same proposition which appellee Wise acted upon (Watson depo. p. 19/R 37); and still more, such as H. C. Milhoan (Watson depo. p. 19/R 348); Marry and Marry (Watson depo. p. 28/R 357); E. L. Orr (Estabrook depo. p. 24/R 492); Bob Porterfield (Estabrook depo. p. 18/R 486); Mr. McKelvey (Turman depo. p. 11/R 441), and other unnamed office workers (Estabrook depo. p. 14/R 482).

The facts in this case as they relate to laches must also be tied back to the stringent burden of proof needed to show an implied trust. Illustrative is the *Geter v. Simmons* case, *supra*, which denied a resulting trust, stating:

> But again, in our view, the evidence adduced to establish the alleged resulting trust in the complainant's favor, when viewed under the shadows and obscurity cast by the long lapse of time since the occurrences testified about, is not so clear, convincing, and free from reasonable doubt as to justify a court of equity in disturbing the title to real estate. 49 So. at 134.



Thus here, as in *Wadlington*, appellant is barred by laches from pressing this stale claim against Watson Wise's property.

* * * *

**EXCERPT FROM REPLY BRIEF OF APPELLEES IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT.**

* * * *

[1] Statement of Additional Facts

The Appellee-Defendant, Watson W. Wise, filed an amendment to his Answer and Additional Affirmative Defenses (R 95-96) on August 26, 1975, and therein stated:

Sixth Affirmative Defense

> That this action is barred by virtue of the final decree of divorce entered in the Court of Domestic Relations in and for Smith County, Texas, in that certain case bearing No. 64-480 in which Louise Orr Wise, now Louise Orr Estabrook, was the plaintiff and Watson W. Wise, defendant, copy of which final judgment is attached hereto, marked Exhibit "A" and by this reference made a part hereof.

The plaintiff filed her Reply to the above quoted Affirmative Defenses (R 99) on September 29, 1975 and, did not plead the applicability or the substance of Texas law as to this defense. At the pre-trial conference on November 10, 1975, it being stipulated that motions for summary judgment previously filed would be heard at that time, neither Texas law nor the applicability thereof were argued or in any way presented to the Court, or introduced as being applicable in this issue. The Court below correctly applied Florida law and entered its Final Summary Judgment (R 264) in favor of all defendants.

In Appellant's main brief filed herein, Appellant does not at any time raise any suggestion that Texas law would apply to

this issue. In fact, for the first time in Appellant's Reply Brief, she tries to raise the issue of the applicability of Texas law to determine whether she is barred from bringing this [2] action to determine the title to Florida real property by the prior final judgment of divorce.

## ARGUMENT

### I. TEXAS LAW IS NOT APPLICABLE BECAUSE IT WAS NOT RAISED AT THE TRIAL COURT.

It has long been established in Florida that there are limitations placed upon the appellant in points which may be raised on appeal. As stated by the Supreme Court in *Hartford Fire Ins. Co. v. Hollis*, Fla. 1909, 50 So. 985, at page 989:

> "(1) It is the policy of this Court to confine the parties litigant to the points raised and determined in the court below, and not to permit the presentation of points, grounds, or objections for the first time in this Court when the same might have been cured or obviated by amendment if attention had been called to them in the trial court."

The purpose of our entire appellate structure is to correct errors of law made by the court below. It is not for the purpose of providing the attorneys an opportunity to re-evaluate their case and seek new and different theories of law upon which their case may be presented.

It is also a well established rule in Florida that if a litigant is to rely upon a law of a foreign state, he must both plead and prove that law at the lower court level. As stated in *United Mercantile Agencies v. Bissonnette*, Fla. 1944, 19 So.2d 466, at page 467:

[3] "Though Section 1 of Article 4 of the Federal Constitution requires that full faith and credit shall be given in each state to the judicial proceedings of any other state, the constitutional mandate entails no obligation upon the courts of justice of sister states to judicially know the law of any other state governing the effect of the judgment in controversy. Questions of presumptions or judicial notice



> are always for the law of the forum. The courts of the forum not being judicially charged with knowledge and hence not bound to take judicial notice of the laws of other states, such foreign laws must be *pleaded and proved* as ultimate facts insofar as it may be necessary to establish the validity of the judgment in the state where rendered." (Emphasis supplied.)

One cannot rely on the law of a foreign state and expect the courts of this state to follow that law unless they are advised beforehand as to what that law is and why it would be applicable. In order for the applicability of foreign law to be raised as an issue on appeal, the question of foreign law must have been raised at the trial court below. *Miller v. Shulman*, 3 DCA 1960, 122 So.2d 890, states this very simply and succinctly at page 590: "the absence from the record of both pleading and proof of foreign law precludes our consideration of this contention raised for the first time in appellant's brief." See also *Brotherhood's Relief & Compensation Fund v. Cagnina*, 2 DCA 1963, 155 So.2d 820; *Jorge v. Rosen*, 3 DCA 1968, 208 So.2d 644; *Movieland, Inc. v. Davis*, 3 DCA 1969, 217 So.2d 890. Therefore, the question raised on appeal about the applicability of Texas law on the *res judicata* effect of the final decree of divorce is totally improper and should not be considered by this Court inasmuch as it was never raised at the lower court level.